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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

HERMAN MOSES, ROBERT ALLEN, JR., LARRY MAURICE, LAWRENCE JERRY, DONALD JERRY, STAN MOSES, BURT MOSES, EDWIN B. DANIELS, HOWARD MOSES, BETTY GOUDY, HENRY KING GEORGE, WALTER ALLEN, ANDY DOMINICK, ARCHIE LEBEHAN, CECIL MOSES, and the MUCKLESHOOT TRIBE OF INDIANS,
Appellants,

v.

THE STATE OF WASHINGTON, THE DEPARTMENT OF FISHERIES, and THE DEPARTMENT OF GAME,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

REFERENCE TO THE OFFICIAL OR UNOFFICIAL REPORTS

The opinion of the Supreme Court of the State of Washington is reported in 70 W.D.2d 276 (*post* A-45) The court below adopted by reference two other opinions in companion cases, *Department of Game v. Kautz*, 70 W.D.2d 270 (*post* A-39), and *Department of Game v. The Puyallup Tribe Inc.*, 70 W.D.2d 241 (*post* A-9).

Nature of the Proceeding

This is an action by the State of Washington to enjoin sixteen individuals and the Muckleshoot Tribe of Indians from fishing in the Green River, King County, State of Washington. The individuals and Indian tribe defended on the ground that the Point Elliott Treaty of 1855 authorized them so to fish.

Statute Pursuant to Which This Action Is Brought

Jurisdiction of the trial court, the Superior Court of the State of Washington for King County, is defined by R.C.W. 2.08.010. Jurisdiction of the Supreme Court of the State of Washington is conferred by R.C.W. 2.04.010.

Dates of the Judgment and Notice of Appeal

The judgment of the Supreme Court of the State of Washington was entered February 13, 1967. The Notice of Appeal was filed April 10, 1967 (Tr. page not paginated).

JURISDICTION

28 U.S. Code, Sec. 1257(1) and (2) confers jurisdiction on this court. A case supporting jurisdiction in this court is *Worcester v. Georgia,* 31 U.S. 515, 536, 540-541; 6 Pet. 515, 536, 540-541 (1832).

The Treaty Which the State Supreme Court Held Invalid as Applied to Appellants Herein

The Treaty is set forth in 12 Stat. 927 and is familiarly called the Point Elliott Treaty of January 22, 1855, ratified by the United States Senate on March 8, 1859, and proclaimed by the President of the United States on April 11, 1859. It is set forth in the Appendix *(post* A-1), but its pertinent provisions are as follows:

Treaty With the Dwamish, Suquamish, etc. 1855:

"Articles of agreement and convention made and concluded at Muckl-te-oh, or Point Elliott, . . . by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and *the undersigned chiefs, headmen and delegates of the . . . Smalh-kamish, Skope-ahmish, St-kah-mish, . . .*, and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington, *on behalf of said tribes, and duly authorized by them.*

"ARTICLE I. *The said tribes and bands of Indians* hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: (Description of land conveyed omitted) . . . , and all the right, title, and interest of the said tribes and bands to any lands within the territory of the United States.

• • •

"ARTICLE V. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands; provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens.

• • •

"ARTICLE XV. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

"In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and *the undersigned chiefs, headmen and delegates of the aforesaid tribes and bands of Indians*, have hereunto set their hands and seals, at the place and on

the day and year hereinbefore written." (Emphasis supplied)

The Supreme Court of the State of Washington held that the three aforementioned tribes were not parties to the Point Elliott Treaty, and hence, as to them, the treaty was invalid. 70 W.D.2d 276, 280 (*post* A-50), as follows:

> "(d) . . . Skope-ahmish descendants failed to establish that their tribe was signatory to the Point Elliott Treaty and, hence, failed to establish that they had any rights thereunder."

The State Statute Whose Validity Was Being Questioned Because Repugnant to a Treaty of the United States Which the State Court Declared Valid

The state statutes which overruled the federal treaty are not identified as such. The amended Complaint on behalf of the State does not identify the state statute (Tr. 29). The Findings of Fact, in paragraph IV, recites that the conduct of the appellants "was and is in violation of the laws of the State of Washington" (Tr. 7). The State Supreme Court at 70 W.D.2d 276, 281 recites that the appellants are "subject to the conservation regulations adopted by the Department and, hence the injunction as entered is proper."

Appellants' own search indicates R.C.W. 75.08.080 and Washington Administrative Code 220-12-001 and 220-20-010 may have some relevance (*post* A-54; A-56).

The Statutes were orally identified at the trial to include the following: R.C.W. 75.12.020; R.C.W. 75.12.070; and R.C.W. 75.12.100 (*post* A-54), but these seem inapposite (Supp. St. 6).

Hypothetically, the court below held that had the

Smahl-kamish, Skope-ahmish, and St-kah-mish "established such rights, it would have been necessary, as in the *Puyallup* case, *supra*, to limit the injunction to their particular methods of fishing which threatened the continued existence of the fishery," 70 W.D.2d 276, 280 (*post* A-50). Using the criterion set up by the court below in the *Puyallup* case (*post* A-25), the court ordered the Indians there involved enjoined from violating any statute or regulation of the State which was "reasonable and necessary for the conservation of the fishery," without further definition.

We have searched the general statutes and rules and regulations of the State of Washington and have collected the same in the appendix at page 54. Broadly speaking, the Director of Fisheries is authorized to promulgate rules and regulations to conserve salmon, which, in his opinion, are reasonable. He has promulgated unidentified regulations as follows (Supp. St. 6):

> "A. There is no open fishery for salmon in the Green River at this time, nor has there been in the twenty years that I have been with the Department."

QUESTIONS PRESENTED

1. Is the Point Elliott Treaty valid as to the Smalh-kamish, Skope-ahmish, and St-kah-mish where such tribes are named as three of the contracting parties in the preamble, where the preamble recites that the chiefs signing said treaty do so "on behalf of said tribes, and duly authorized by them," where said tribes ceded to the United States their aboriginally held lands, where the treaty recites that it "shall be obligatory on the contracting parties" when ratified, where the signature clause recites

that the chiefs "of the aforesaid tribes and bands of Indians, hereunto set their hands and seals," but where no signator has a description adjacent to his signature describing him as a member of said three tribes, and where the Court of Claims in 1934 held that said Indian tribes were parties to the treaty so that the three tribes may claim the benefits of such treaty (their reserved off-reservation fishing rights at their usual and accustomed fishing locations)?

2. Can the State of Washington prohibit members of three Indian tribes from fishing within their treaty reserved areas of upriver, usual and accustomed fishing locations when, at the same time, the State permits virtually uncontrolled invasions of the salmon run destined for such reserved areas by the commercial and sports fishermen, and where the spawning area has been constricted by the erection of a hydro-electric dam?

3. Is the criterion for the regulation of upriver treaty reserved Indian fishing rights those which are reasonable and necessary on the one hand, or necessary and indispensable on the other hand?

4. Whether the State of Washington has any power at all to regulate off-reservation reserved rights by the Indians to fish at their usual and accustomed fishing locations, the same having been assumed by the Department of the Interior of the United States?

5. Whether the State of Washington may, by general law and regulations (applicable to the public at large), without specifying Indian fishing rights as such, regulate treaty-reserved fishing rights?

CONCISE STATEMENT OF THE CASE

This case, from beginning to end, raises two broad questions: Is the Point Elliott Treaty valid as to three of the contracting parties, the Skope-ahmish, Smalh-kamish, and St-kah-mish Indian tribes, and if so, may the State of Washington regulate their treaty-secured off-reservation fishing at their usual and accustomed fishing locations.

For jurisdictional purposes, the case from beginning to end relates to the coverage of the Treaty of Point Elliott, and are the three Indian tribes parties to it; and does the State have the power to regulate the off-reservation fishing rights of the three Indian tribes; if so, to what extent?

The issue of the existence of the Treaty was raised by the appellants in their Amended Answer and Counterclaim (Tr. 29); denied by the appellees (Tr. 15); preserved to the appellees by Order of the Court (Tr. 31); and discussed by the trial court in its oral opinion (St. 226). The trial court orally considered the fact that the individual appellants of the present-day Muckleshoot tribe are members of the Skope-ahmish tribe, whose lands were taken over by the United States following the Treaty of Point Elliott, and orally discussed that such were not a party to the Treaty (St. 230).

The trial court's oral opinion became its Findings of Fact and was, therefore, repeated in writing by the trial court (Tr. 5).

The court below recognized the issue by repeating the prayer of the Amended Answer and Counterclaim (70 W.D.2d 276, 277) (*post* A-47), and affirmed the trial court as follows:

> "With reference to these three conclusions of the trial court, it seems to us clearly established that the then nonexistent Muckleshoot Tribe, as such, had no treaty rights; that the individual defendants, as Skopeahmish descendants, failed to establish that their tribe was signatory to the Point Elliott Treaty and, hence, failed to establish that they had any right thereunder." 70 W.D.2d 276, 280 (*post* A-50).

With respect to the second broad issue, may such treaty rights be regulated by the State, it was raised by appellants' Amended Answer and Counterclaim (Tr. 28), by the trial court in its oral decision (St. 226), by the appellees' denying appellants' affirmative claim of immunity to regulation (Tr. 21, 15), by the trial court's concluding as a matter of law that the State could enjoin the appellants from fishing contrary to the rules and regulations of the State (Tr. 13), and by the State Supreme Court's adopting the criterion of the companion case, *Department of Game v. The Puyallup Tribe Inc.*, 70 W.D.2d 241 (*post* A-9).

The issue as to the reasonableness of the regulation as opposed to treaty rights was raised inextricably in the foregoing citations relating to the right to regulate at all. In addition, the issue was raised by the Amended Answer and Counterclaim (Tr. 33, 34), by the subject of inquiry in the trial of the case, e.g.:

> "Q. Then, as a spokesman for the Fisheries Department, it is the purpose of the Fisheries Department to exclude the Indians from that Soos Creek area completely, isn't it?
>
> "A. From the Green River?
>
> "Q. From the whole Green River.
>
> "A. Except as the regulations of the Department apply" (Supp. St. 72).

by the trial court in its Conclusions of Law (Tr. 13) as follows:

> "That if the treaty is considered to have been negotiated for the benefit of all persons whose lands were taken so as to vest in these defendants any rights, such rights could fully be satisfied by the Washington State Department of Fisheries delivering to that portion of the Muckleshoot tribe who have Skope-ahmish blood, *the carcasses of ten percent of the fish removed from Soos Creek for use by the hatchery.*". (Emphasis supplied)

by the State Supreme Court when it adopted the Puyallup test, 70 W.D.2d 276, 280 (*post* A-50) as follows:

> ". . ., but such (fishing) rights are not absolute; they do not extend to the right to fish with such gear and at such times as would destroy the fishery." 70 W.D.2d 241, 250.

and then follows several pages where the court below explored the degree of regulation that the State is authorized to engage in.

Brief in Support of Question 1 to Show Substantiality—Conflict Between Court of Claims and the State Supreme Court

Question 1 poses the problem of whether the Smalh-kamish, Skope-ahmish, and St-kah-mish are parties to the Point Elliott Treaty. The trial court held (*post* 229) that "The fifteen individual defendants were descendants of the Skope-ahmish Tribe . . ., but that they had no rights under the treaty because the Skope-ahmish Tribe did not sign the treaty and no one signed it in its behalf" (*post* A-49).

The State Supreme Court held (*post* A-51):

> "Nor does the fact that three of the numerous groups that became part of the Muckleshoot Tribe

were named in the Treaty of Point Elliott but did not sign it, confer treaty status on all members of the Muckleshoot Tribe."

An examination of the treaty itself (*post* A-1) discloses that the preamble recites that the chiefs signing said treaty did so "on behalf of said tribes, and duly authorized by them." The tribes for whom the chiefs were signing included the Skope-ahmish, Smalh-kamish, and St-kah-mish (*post* A-1)..

By the terms of the treaty, these three tribes and the others ceded to the United States their aboriginally held lands in Article I thereof.

Article XV of the treaty provides as follows:

"This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States."

The signature clause (*post* A-6) provides:

"In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and *the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians,* have hereunto set their hands and seals, at the place and on the day and year hereinbefore written." (Emphasis supplied)

The Court of Claims in *Duwamish et al. Indians v. The United States,* 79 Ct. Cl. 530, at 556, stated as follows:

"All of the Indians placed upon the Muckleshoot reservation except the Muckleshoot tribe or band were parties to the treaty of Point Elliott, the 'Smahl-kamish,' 'Skope-ahmish,' and 'St-kah-mish' (or properly 'Sekamish') as independent bands."

The use of the term Muckleshoot tribe or band in the

foregoing quotation does not relate to the instant problem, because there was in fact a Muckleshoot tribe originally, and the modern use of the term Muckleshoot, composed of the Smahl-kamish, Skope-ahmish, and St.-kah-mish, is merely a colloquial term and not to be confused with the former Muckleshoot band, 79 Ct. Cl. 530, 603, 604:

> "From contemporaneous records, official in character, it indisputably appears that we have tribes of Indians other than the so-called 'Muckleshoots' inhabited what was known as the Muckleshoot reservation, and that all of those placed upon the same were parties to the Treaty of 1855."

The United States has accepted the cession of lands which these three tribes and the others conveyed to the United States, which are described in Article I of the Treaty (*post* A-2). The Court of Claims so held in 79 Ct. Cl. 530, 556, as follows:

> "By Article I of this treaty, the Indian parties thereto ceded, relinquished and conveyed to the United States all their right, title and interest in and to a certain described tract of country and also all their right, title and interest in and to any lands within the territory of the United States."

The Findings of Fact here likewise held, as a fact, that the United States took the Skope-ahmish lands (F. of F. No. 20, St. 229). In the Court of Claims case, the Skope-ahmish, Smalh-kamish, and St-kah-mish were seeking compensation for the creation of the Muckleshoot reserve (not to be confused with a true Indian reservation), but the Court of Claims dismissed the alleged taking by the United States of the lands out of which the Muckleshoot reservation was created, because:

> ". . . that treaty contained a cession of all lands claimed by right of occupancy (and thus), this item in suit must be dismissed." 79 Ct. Cl. 530, 604.

The two points which are so far delineated may be summarized as follows: The Indians signing for the named tribes, by the very instrument of the treaty, were authorized to sign for the designated Indian tribes, which included the appellants' three by their very name. Secondly, the United States has accepted the cession of their land by way of its interpretation of the very language now sought to be voided by the State. Appellants urge that the high commissioners of the United States, after having persuaded the various chiefs of certain-named tribes, among whom appellants are named, to cede vast areas of land, and after having taken possession thereof, cannot now, in law or morals, repudiate the *quid pro quo* that enriched the United States and make beggars of the trusting wards, after more than one hundred years of quiet enjoyment.

The failure to use plainer *descriptio personae* is meaningless in the face of the words of actual authority.

It is an innovation for the United States to accept benefits from the three Indian tribes by way of the cession and now, at this late date, to renounce the rights reserved by the three Indian tribes as being legally, under the white man's law, void and invalid, as if the Indians understood the law of contracts.

It is time for this court to inquire.

Brief in Support of Question 2 to Show Substantiality

Question 2 urges that the three Indian tribes here involved, fishing under the rights reserved in Article V at their usual and accustomed fishing locations, have been prohibited, while the State authorizes virtually uncontrolled invasions of the salmon run (destined for such reserved areas) by the commercial and sports fishermen, and by the erection of a hydro-electric dam that totally restricts what escapes these predators.

The life cycle of the salmon is that it spawns in fresh water; upon reaching the fingerling stage, it descends to salt water, where it matures; and then it returns to the river of its origin to spawn.

So it is with the salmon of the Green River, where the accustomed fishing locations of the three Indian tribes are located (St. 229). In companion cases, *Department of Game v. Kautz*, 70 W.D.2d 270 (*post* A-39), and *Department of Game v. The Puyallup Tribe Inc.*, 70 W.D. 2d 241 (*post* A-9), the court below held that those two Indian tribes there involved must obey the general conservation laws of the State of Washington relating to salmon and applied the rules of those two cases to the instant one as follows:

> "Had they established such rights, it would have been necessary, as in the *Puyallup* case, *supra*, to limit the injunction to their particular methods of fishing, which threatened the continued existence of the fishery; but not having established the existence of any treaty rights, they, like all other citizens, are subject to the conservation regulations adopted by the Departments and, hence, the injunction as entered is proper." 70 W.D.2d 276, 280.

The State Fisheries representative testified:

". . . Those are our endeavors, to produce and to harvest (Supp. St. 74).

• • •

"Q. . . . Then the harvesting, under the present regulation which your Department approves, is to take place in salt water?

"A. Not entirely. In areas of migration and not in areas where fish hold up or spawn.

• • •

"A. There is no area on the Green (River), to my knowledge, that fish do not hold up for quite a period of time in the entire area (before) spawning" (Supp. St. 76).

Thus, the Green River Reserve (Supp. St. 6) was created, prohibiting the taking of any salmon by anyone. The philosophy of the State is (Supp. St. 48):

"Q. As a biologist, do you know why the river is closed to net fisheries?

"A. Well, this is a most reasonable criteria, inasmuch as we have to have escapement of appreciable numbers to provide the stock for perpetuation of the run."

and Supp. St. 51:

"A. . . . As a biologist, I would like to make the qualified remark that the stock of (certain salmon on the Green River) are all needed *to perpetuate the run and to use in the management system throughout the state.* (Emphasis supplied)

• • •

"A. But with our present concept of management of salmon resources, the sea is quite unlimited in its productive ability, and if we use those stocks that are available to us for management purposes, *we can augment the production of the sea, so those that do come back to us for stocking purposes*

should be used for those purposes." (Emphasis supplied) (Cf. Finding Nos. 8, 9, and 11, St. 227)

Thus, it is the avowed intention of the State "to augment the production of the sea," i.e., the harvesting of salmon in Puget Sound, Straits of Juan de Fuca, and the ocean; and to use the seed salmon of Green River "to perpetuate the (Green River) run" and "for stocking purposes" "in the management system throughout the state."

The harvesting of the salmon in the sea places the burden of conservation on the Indian fisheries, *viz.* (Supp. St. 69):

> "A. Under the authority of the Director, the Department has studied Indian fisheries throughout the State wherever they occur. And off-reservation fisheries, or the type which we have observed, have been found, in general, to be very detrimental to the run of fish."

Appellants will urge on a plenary consideration that the State, by its system of regulation, is taking their property and giving it to the public.

A substantial question is presented when a treaty-secured right is obliterated so that the public can, in other areas, harvest the salmon on their journey to the treaty-protected areas.

Brief in Support of Question 3 to Show Substantiality—Conflict Between the Court of Appeals and the State Supreme Court

The question here posed is whether the regulations must be reasonable and necessary on the one hand or necessary and indispensable on the other. The court below, in adopting the *Puyallup* case as setting forth the proper test of the validity of a regulation (70 W.D.2d

276, 280) (*post* A-50), held that the regulation must merely be reasonable and necessary as follows:

> ". . . any regulations of the Departments limiting or restricting these rights must be reasonable and necessary for the preservation of the fishing." 70 W.D.2d 241 (*post* A-24).

Appellants invoke the classical reason for this court's taking jurisdiction, that of a conflict between courts. Appellants cite *Maison v. Confederated Tribes of the Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir. 1963) (Cert. denied, 375 U.S. 829). The Ninth Circuit held at 314 F.2d 169, 172:

> "Thus, in both *Tulee* and *Makah* cases it was held that the Indians' right to fish is qualified by the state's right to regulate such fishing when necessary for conservation, but, to establish necessity the state must prove two facts; first, that there is a need to limit the taking of the fish, secondly, that the particular regulation sought to be imposed is 'indispensable' to the accomplishment of the needed limitation."

The court below in these three companion cases rejected the Ninth Circuit criterion as follows:

> "We are convinced that the three judges of the Ninth Circuit Court of Appeals, who decided the *Maison* case, *supra*, read too much into the Supreme Court's use of the word 'indispensable' in the *Tulee* case and have created therefrom a completely unworkable standard for determining what regulations relative to the time and manner of fishing outside the reservation may be imposed on Indians claiming treaty rights." 70 W.D.2d 241, 254 (*post* A-22).

Thus, there is a direct conflict between the Ninth Circuit on the one hand and the court below on the other.

The conflict is important, because:

> ". . . while a restriction of the fishing activities of the (Indians) must be indispensable . . . , a restriction of the fishing activities of other citizens of a state is valid if merely reasonable. . . . The complete exclusion of sports fishermen from the spawning grounds as an alternative does not amount to arbitrary discrimination against them, because the state possesses broader power to regulate sports fishing than it does to regulate fishing by the Indians." 314 F.2d 169, 172.

And the battle lines are drawn; for example (Supp. St. 294):

> "A. The Washington State Sportsmen's Council is completely opposed to fishing on spawning grounds(,)"

no doubt because their members do not want to curtail their sports fishing in the salt water so long as the Indian areas provide the seed fish.

Brief in Support of Question 4 to Show Substantiality

The question here posed is: which agency has the right to regulate Indian fisheries—the State or the Department of the Interior.

The Department has gone so far as to propose rules for such regulation, 30 F. Reg. 8969, 25 CFR Part 255, (*post* A-59).

Thus, there is a direct conflict of regulating and policing efforts.

The compact between the people of Washington and the United States, codified in the Washington State Constitution, R.C.W. Vol. 0, prohibits interference by the State with Indian "lands," *viz*:

> "The following ordinance shall be irrevocable with-

out the consent of the United States and the people of this state:

• • •

"Second. That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, *the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.* (Emphasis supplied)

• • •

In view of *Alaska Pacific Fisheries v. United States,* 248 U.S. 78 (1918), where "islands" was construed to comprehend fisheries, the power of the State to regulate at all is substantially in doubt.

Brief in Support of Question 5 to Show Substantiality

Question No. 5 relates to the general regulatory scheme being premised without reference to Indian fisheries. Thus, if it were appropriate to authorize limited takings, the persons authorized to take such would be the public and the Indians would operate merely as members of the public.

This is a complete denial of treaty-secured rights and the State's whole scheme should be denounced.

Public Importance

The Congress has interested itself in this whole problem and a wealth of information is contained in *Northwest Salmon Fisheries Resources,* Joint Hearing before the Senate Committee on Commerce and House Merchant Ma-

rine and Fisheries Committee, October 13, 1961, and *Indian Fishing Rights,* Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, August 5 and 6, 1964.

The State Supreme Court has been much troubled by the problem, *viz. State v. McCoy,* 63 Wn.2d 421, 387 P.2d 942 (1963); *State v. Satiacum,* 50 Wn.2d 513, 314 P.2d 400 (1957); and the instant three cases.

The State Fisheries Department includes a special section in its annual report related to Indian fishing problems. In the 1961 report, the Department stated:

> "The regulation of treaty Indians fishing at their usual and accustomed places located outside the boundaries of the Reservations poses completely different problems. Arrests have been made of Indians fishing salmon outside their Reservations in violation of State laws and regulations. We have had no appreciable success in this and in fact have lost ground in the last seven or eight years through court decisions which for the most part gave the Indian fishermen practically a free hand to fish wherever, whenever and by any method they chose. Here again, we have completely uncontrolled fisheries in operation."

CONCLUSION

It is time that these conflicts and puzzlements be resolved. Appellants urge that they should not be relegated "to the carcasses of ten percent of the fish removed from the (Green River) for use by the hatchery" (Tr. 13).

WHEREFORE, appellants pray for a plenary consideration of this case, and that it be reversed.

L. FREDERICK PAUL
Counsel for Appellants

FREDERICK W. POST
Of Counsel



APPENDIX A

12 Stat. 927

JAMES BUCHANAN,
President of the United States of America,

To All and Singular to Whom These Presents Shall Come, Greeting:

Whereas a treaty was made and concluded at Muckl-te-oh, or Point Elliott, in the Territory of Washington, the twenty-second day of January, one thousand eight hundred and fifty five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the hereinafter-named chiefs, headmen and delegates of the Dwamish, Suquamash, Sk-tahl-mish, Sam-ahmish, Smalh kahmish, Skope-ahmish, St-kah-mish, Snoqualmoo, Skai-wha-mish, N'Quentl-ma-mish, Sk-tah-le jum, Stoluck-wha-mish, Sno-ho-mish, Skagit, Kik-i-allus, Swin a mish, Squin ah-mish, Sah ku-mehu, Noo-wha-ha, Nook wa-chah mish, Mee see-qua-guilch, Cho bah-ah-bish and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington, on behalf of said tribes and duly authorized by law; which treaty is in the following words and figures to wit:

Articles of agreement and convention made and concluded at Muckl-te-oh, or Point Elliott, in the Territory of Washington, this twenty-second day of January, eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the Dwamish, Suquamish, Sk-tahl-mish, Samahmish, Smalh-kamish, Skope-ahmish, St-kah-mish, Snoqualmoo, Skai-wha-mish, N'Quentl-ma-mish, Sk-tah-le-jum, Stoluck-wha-mish, Sno-ho-mish, Skagit, Kik-i-allus, Swin-a-mish, Squin-ah-mish, Sah-ku-mehu, Noo-wha-ha, Nook-wa-chah-mish, Me-see-qua-guilch, Cho-bah-ah-bish, and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington, on behalf of said tribes, and duly authorized by them.

ART. I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: Commencing at a point on the eastern side of Admiralty inlet, known as Point Pully, about midway between Commencement and Elliott bays; thence eastwardly, running along the north line of lands heretofore ceded to the United States by the Nisqually, Puyallup, and other Indians, to the summit of the Cascade range of mountains; thence northwardly, following the summit of said range to the 49th parallel of north latitude; thence west, along said parallel to the middle of the gulf of Georgia; thence through the middle of said gulf and the main channel through the Canal de Arro to the straits of Fuca, and crossing the same through the middle of Admiralty inlet to Suquamish Head; thence southwesterly, through the peninsula, and following the divide between Hood's Canal and Admiralty inlet to the portage known as Wilkes' portage; thence northeastwardly, and following the line of lands heretofore ceded as aforesaid to Point Southworth, on the western side of Admiralty inlet, and thence round the foot of Vashon's island eastwardly and southeastwardly to the place of beginning, including all the islands comprised within said boundaries, and all the right, title, and interest of the said tribes and bands to any lands within the territory of the United States.

ART. II. There is, however, reserved for the present use and occupation of the said tribes and bands the following tracts of land, *viz*: the amount of two sections, or twelve hundred and eighty acres, surrounding the small bight at the head of Port Madison, called by the Indians Noosohk-um; the amount of two sections, or twelve hundred and eighty acres, on the north side Hwhomish bay, and the creek emptying into the same called Kwilt-sen-da, the peninsula at the southeastern end of Perry's island called Shais-quihl, and the island called Chah-choo-sen, situated in the Summi river at the point of separation of the mouths emptying respectively into Bellingham bay and the gulf of Georgia; all which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to

reside upon the same without permission of the said tribes or bands, and of the superintendent or agent, but, if necessary for the public convenience, roads may be run through the said reserves, the Indians being compensated for any damage thereby done them.

ART. III. There is also reserved from out the lands hereby ceded the amount of thirty-six sections, or one township of land, on the northeastern shore of Port Gardner, and north of the mouth of Snohomish river, including Tulalip bay and the before mentioned Kwilt-seh-da creek, for the purpose of establishing thereon an agricultural and industrial school, as hereinafter mentioned and agreed, and with a view of ultimately drawing thereto and settling thereon all the Indians living west of the Cascade mountains in said Territory; provided, however, that the President may establish the central agency and general reservation at such other point as he may deem for the benefit of the Indians.

ART. IV. The said tribes and bands agree to remove to and settle upon the said first above mentioned reservations within one year after the ratification of this treaty, or sooner, if the means are furnished them. In the meantime it shall be lawful for them to reside upon any land not in the actual claim and occupation of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

ART. V. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands; provided, however, that they shall not take shell fish from any beds staked or cultivated by citizens.

ART. VI. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of one hundred and fifty thousand dollars, in the following manner—that is to say: For the first year after the ratification hereof, fifteen thousand dollars; for

the next two years, twelve thousand dollars each year; for the next three years, ten thousand dollars each year; for the next four years, seven thousand five hundred dollars each year; for the next five years, six thousand dollars each year; and for the last five years, four thousand two hundred and fifty dollars each year. All which said sums of money shall be applied to the use and benefit of the said Indians under the direction of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same; and the Superintendent of Indian Affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ART. VII. The President may hereafter, when in his opinion the interests of the Territory shall require and the welfare of the said Indians be promoted, remove them from either or all of the special reservations hereinbefore made to the said general reservation, or such other suitable place within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of such removal, or may consolidate them with other friendly tribes or bands; and he may further at his discretion cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the 6th article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President and payment made accordingly therefor.

ART. VIII. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ART. IX. The said tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof, and they

pledge themselves to commit no depredations on the property of such citizens. Should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe except in self-defense, but will submit all matters of difference between them and the other Indians to the government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on other Indians within the Territory the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ART. X. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging to said tribe who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ART. XI. The said tribes and bands agree to free all slaves now held by them and not to purchase or acquire others hereafter.

ART. XII. The said tribes and bands further agree not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

ART. XIII. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of fifteen thousand dollars, to be laid out and expended under the direction of the President and in such manner as he shall approve.

ART. XIV. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer for the like term of twenty years to instruct the Indians in their respective occupations. And the United States finally agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of said school, shops, persons employed, and medical attendance to be defrayed by the United States, and not deducted from the annuities.

ART. XV. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS, [L. S.]
Governor and Superintendent.

Seattle, his x mark. [L. S.]
Chief of the Dwamish and Suquamish tribes.

Pet-ka-nam, his x mark. [L. S.]
Chief of the Snoqualmoo, Snohomish and other tribes.

Chow-its-hoot, his x mark. [L. S.]
Chief of the Lummi and other tribes.

Gonah, his x mark. [L. S.]
Chief of the Skagits and other allied tribes.

Kwallattum, or General Pierce, his x mark. [L. s.]
Sub-chief of the Skagit tribe.

S'Hoolst-hoot, his x mark. [L. s.]
Sub-chief of Snohomish.

Snah-talc, or Bonaparte, his x mark. [L. s.]
Sub-chief of Snohomish.

Squush-um, or The Smoke, his x mark. [L. s.]
Sub-chief of the Snoqualmoo.

See-alla-pa-han, or The Priest, his x mark. [L. s.]
Sub-chief of Sk-tah-le-lum.

He-uch-ku-nam, or George Bonaparte, his x mark. [L. s.]
Sub-chief of Snohomish.

Tse-nah-talc, or Joseph Bonaparte, his x mark. [L. s.]
Sub-chief of Snohomish.

Ns'Ski-oos, or Jackson, his x mark. [L. s.]
Sub-chief of Snohomish.

Wats-ka-lah-tohie, or John Hobtst-hoot, his x mark. [L. s.]
Sub-chief of Snohomish.

(68 Names Omitted for Brevity)

Executed in the presence of us—

M. T. Simmons, *Indian Agent.*
C. H. Mason, *Secretary of Washington Territory.*
Benj. F. Shaw, *Interpreter.*
Chas. M. Hitchcock.
H. A. Goldsborough.
George Gibbs.
John H. Scranton.
Henry D. Cock.
S. S. Ford, Jr.
Carrington Cushman.
Ellis Barns.
R. S. Bailey.
S. M. Collins.
Lafayette Balch.
E. S. Fowler.
J. H. Hall.
Rob't Davis.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional ac-

tion thereon, the Senate did, on the eighth day of March, one thousand eight hundred and fifty-nine, advise and consent to the ratification of its articles by a resolution in the words and figures following, to wit:

"In Executive Session, Senate of the United States,
"March 8, 1859.

"*Resolved*, (two-thirds of the senators present concurring), That the Senate advise and consent to the ratification of the treaty between the United States and the chiefs, headmen and delegates of the Dwamish, Suquamish and other allied and subordinate tribes of Indians occupying certain lands situated in Washington Territory, signed the 22nd day of January, 1855.

"Attest: "ASBURY DICKINS, *Secretary*."

Now, therefore, be it known that I, JAMES BUCHANAN, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the eighth of March, one thousand eight hundred and fifty-nine, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, and have signed the same with my hand.

Done at the city of Washington, this eleventh day of April, in the year of our Lord one thousand eight hundred and fifty nine, and of the independence of the United States the eighty third.

JAMES BUCHANAN.

By the President:

Lewis Cass, *Secretary of State*.

APPENDIX B

[No. 38611. En Banc. January 12, 1967.]

THE DEPARTMENT OF GAME *et al.*, *Respondents v.* THE PUYALLUP TRIBE, INC., *et al.*, *Appellants.*

Appeal from a judgment of the Superior Court for Pierce County, No. 158069, John D. Cochran, J., entered August 13, 1965. *Reversed in part.*

Action for a declaratory judgment. Defendants appeal from a judgment in favor of the plaintiffs.

Arthur R. Knodel and *Malcolm S. McLeod* for appellants.

The *Attorney General* and *Joseph L. Coniff, Assistant,* for respondents.

HILL, J.—The Department of Game of the State of Washington and the Department of Fisheries of the State of Washington, hereinafter called the Departments, brought this declaratory judgment action[1] for the purpose of determining whether certain named individuals had, as members of the Puyallup Indian Tribe, any privileges or immunities from the application of state conservation measures.

The defendants asserted rights under Article 3 of the Treaty of Medicine Creek (10 Stat. 1132) between the United States and various Indian tribes including the Puyallups. This treaty was signed December 26, 1854; ratified by the United States Senate March 3, 1855, and proclaimed by the President of the United States April 10, 1855. This treaty was the first of a group of 11 treaties negotiated with the Indian Tribes of the Pacific Northwest between December 26, 1854 and July 16, 1855.

By the treaty, the Puyallup Indians ceded, relinquished and conveyed to the United States "all their right, title,

1. The case caption is erroneous, there being no entity known as "The Puyallup Tribe, Inc., a corporation." The Puyallup Tribe of Indians did appear and answer by and through the chairman of the Tribal Council.

and interest in and to the lands and country occupied by them," in return for which they received a reservation and certain rights, including those named in article 3 which reads:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory,[2] and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

The trial court concluded that the Puyallup Tribe no longer existed as an entity and that its members no longer had any rights under the treaty; that there was no longer any Puyallup Indian Reservation and, hence, that the Puyallup Indians had no fishing rights within what had been the reservation; and that

> It is reasonable and necessary that state conservation, rules and regulations be uniformly applied to all citizens on an equal basis. (Finding No. 4)

Consequently, the trial court permanently enjoined the defendants and all members of the "Puyallup Tribe" from fishing in the Puyallup River watershed and Commencement Bay in any manner contrary to the laws of the State of Washington, or contrary to the rules and regulations of the Departments.

From that judgment, the Puyallup Indian Tribal Council appeals.

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2. Each of the treaties with the Indians in Washington Territory preserved to the Indians the right to take fish exclusively in the reservations and at all usual and accustomed places (or, as in the treaty with which we are here concerned, "at all usual and accustomed grounds and stations"), in common with citizens of the Territory, or variably in common with citizens of the United States.

It is first urged that the state Departments are not entitled to seek relief under the Uniform Declaratory Judgments Act (R.C.W. 7.24.010 *et seq.*). Basically, the contention is that the issues here before us for determination should be raised in individual criminal actions brought against Indians who violate the food fish and game fish conservation laws found in Titles 75 and 77 R.C.W., or the regulations promulgated thereunder.

[1] A multiplicity of arrests for violation of fishing regulations, which involve the jailing and detention for considerable periods of individuals and consequent hardship to them and their families, seems to us the unnecessarily hard way of determining whether they have immunity from certain fishing regulations.

Since the Indians who claim immunity from these regulations claim them under treaties between the United States and various Indian tribes, it seems to us that the state Departments acted wisely in seeking an interpretation of those treaties and a delineation of the rights of the members of the different tribes in a series of actions under the Uniform Declaratory Judgments Act.

On the merits, both parties assume an extreme and adamant position.

The Departments take the position that the Indians never had, as against the United States, any right to the "use and occupancy" of any land; that they were and are a conquered people without right or title to anything. Having nothing to cede, there was no consideration for any promises made to them, and there is no necessity to respect those promises even though they were labeled "treaties."

[2] Our answer[3] is that regardless of whether treaties with Indian tribes were necessary, they were deemed desirable by the United States and those entered into by it cannot be repudiated by this state or its courts.

3. A much more detailed and completely devastating answer is given by the Supreme Court of the United States in *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 55, 91 L.Ed. 29, 67 Sup. Ct. 167 (1946). Even the dissent in that case, while disagreeing with the view

The case of *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 273, 99 L.Ed. 314, 317, 75 Sup. Ct. 313, 314 (1955), on which the Departments rely, points out specifically that there were no treaty rights involved and says:

> This is not a case that is connected with any phase of the policy of the Congress, continued throughout our history, to extinguish Indian title through negotiation rather than by force. . . .

Nor is there anything in *Village of Kake v. Egan*, 369 U.S. 60, 72, 7 L.Ed.2d 573, 581, 82 Sup. Ct. 562, 569 (1962), also relied upon by the Departments, which contains any suggestion that the United States is now about to allow a state to repudiate any treaty which the United States has made. The opinion does point out that,

> In 1871 the power to make treaties with Indian tribes was abolished, 16 Stat. 544, 566, 25 U.S.C. § 71.

and that there were no treaties with Alaska Indians. It should also have pointed out that the same enactment provided that "no obligation of any treaty lawfully made and ratified" with an Indian tribe prior to March 3, 1871, was "invalidated or impaired." The opinion does not directly or by inference imply that the United States was just playing "Treaty" with the Indians when the Senate ratified and the President proclaimed the treaty here in question. It was not the Indians, but the United States and the white settlers in the Territory of Washington who

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of the majority opinion as to Indian rights and title in the aboriginal lands "when there has been no prior recognition by the United States through treaty or statute of any title or legal or equitable right of the Indians in the land," does not suggest the abrogation of the treaties which have been ratified.

We commend, too, as an answer to the "hard-boiled" argument of the Departments, the article on "Original Indian Title" in "The Legal Conscience," a volume of the selected papers of Felix S. Cohen (pp. 273-303), in which he points out that the *Tillamooks* case, *supra*,

". . . gives the final coup de grace to what has been called the 'menagerie' theory of Indian title, the theory that Indians are less than human and that their relation to their lands is not the human relation of ownership but rather something similar to the relation that animals bear to the areas in which they may be temporarily confined. . . ."

were asking for this and other treaties in 1854 and 1855.

The Departments further urge that if the Puyallup Indians ever had any fishing rights as such, their rights in the reservation area long ago ceased to exist; that the members of the Puyallup Tribe are all citizens of the United States and of the State of Washington and have no rights different from any other citizen.

The defendants, on the other hand, urge that they have rights under the Medicine Creek Treaty to fish on the reservation and at other "usual and accustomed grounds and stations" at any time and with any type of gear they choose and that they do not have to comply with any regulation, or if they have to recognize any regulation it must be "indispensable" to the preservation of the fishery. (This last position is posited on *Maison v. Confederated Tribes of the Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir. 1963), which will be discussed later in this opinion.)

The observation of Mr. Justice Black in *Tulee v. Washington*, 315 U.S. 681, 684, 86 L.Ed. 1115, 1119, 62 Sup. Ct. 862, 864 (1941), is still apropos:

> We think the state's construction of the treaty is too narrow and the appellant's too broad; . . .

The members of the tribes signatory to the various treaties do have certain special fishing rights thereunder, notwithstanding the contention of the state. And the members of such tribes are subject at least to regulations which are necessary for the preservation of the fishery, notwithstanding their contentions to the contrary.

We will now consider whether the trial court erred in reaching the conclusion:

> There is no presently existing Puyallup Tribe of Indians which succeeds in interest to the original Puyallup Indian Tribe which was signatory to the Treaty of Medicine Creek (Conclusion of Law No. 1).

To support this conclusion, the trial court made findings Nos. 10 and 11.

> While some of the defendants have participated in the affairs of a federally organized group known as the "Puyallup Tribe," this organization is in essence no different than the Italian-American Club or the Sons and Daughters of Norway, or like social groups. Over the years, the defendants have blended themselves into the dominant Western-European society to such an extent that they are indistinguishable from all other citizens of this state except for the fact that in some instances individuals may be able to trace their blood line ancestry to a member of the aboriginal tribe of Puyallup Indians. The activities of the defendants, insofar as they are related to the federal organization known as the "Puyallup Tribe," have been limited to considering problems with regard to membership, operation of cemetary [*sic*], the disposition of certain trust funds remaining on deposit for their benefit in the Treasury of the United States and the present assertion of their claimed immunities from state conservation measures.
>
> The federal organization known as the "Puyallup Tribe" maintains no courts, has no policemen, and occupies no given land area. In fact, the lands over which the defendants assert exclusive jurisdiction now comprise an integral part of the City of Tacoma (Finding No. 10).
>
> In 1929 the United States Government established a membership list of the then living descendants of the aboriginal tribe of Puyallup Indians. Blood line descendancy was not required to have an individual's name appear on the roll. The 1929 roll was prepared for the purpose of distributing certain funds resulting from the sale of the few remaining trust lands still held for the benefit of the aboriginal Puyallup Tribe of Indians by the United States Government. This roll is now out of date, and although some efforts have been made to make it current, these efforts have not yet been successful. This court is unable to determine who is, or is not, a member of the federal

organization known as the "Puyallup Tribe" at this time (Finding No. 11).

[3] We are satisfied that so long as the United States government, through its appropriate agencies, continues to recognize the existence of the Puyallup Tribe of Indians and its tribal roll, as they clearly do, the Superior Court for Pierce County acted without jurisdiction in making a judicial determination of the tribe's termination.

Historically and uniformally the termination of federal supervision of an Indian tribe has been accomplished by the Congress through enactment of legislation.[4] And even the Supreme Court of the United States defers to the executive and other political departments of government "whose more special duty it is to determine such affairs" stating that "If by them those Indians are recognized as a tribe, this court must do the same." (*United States v. Sandoval*, 231 U.S. 28, 47, 58 L.Ed. 107, 114, 34 Sup. Ct. 1, 6 (1913)).

The trial court's "Memorandum Decision" is a very able and scholarly document, and while we have disagreed on this phase of the case, we are persuaded by its presentation that the time is long past when there should be a supercitizenship on the part of those proudly claiming Puyallup-tribe ancestry which entitles them to disobey laws and regulations imposed for the conservation of a great natural resource, which all other citizens must obey. However, it is a supercitizenship conferred by treaty, and only the United States can remove the discrimination.

The trial court also found:

> All of the lands within the exterior boundaries of the old Puyallup Indian Reservation were sold, in fee simple absolute, pursuant to an act of Congress (33 Stat. 565) with the exception of two small

4. For examples of such legislation see: Termination of the Klamath Tribe, 25 U.S.C.A. § 564; Termination of Wyandotte Tribe of Oklahoma, 25 U.S.C.A. §§ 791-807; Termination of the Peoria Tribe of Oklahoma, 25 U.S.C.A. §§ 821-826; Termination of the Ottawa Tribe of Oklahoma, 25 U.S.C.A. §§ 841-853; Termination of Menominee Tribe of Wisconsin, 25 U.S.C.A. §§ 891-902; and Termination of the Ponca Tribe of Nebraska, 25 U.S.C.A. §§ 971-980.

> tracts which are presently being utilized as a cemetery for members of the federal organization known as the "Puyallup Tribe." The total acreage remaining in trust status is approximately 22 acres. The original reservation was in excess of 18,000 acres. (Finding No. 12)

The evidence supports this finding, and it is clear that though the Puyallup Tribe continues to exist, the entire reservation, except for the small tract to which reference was made, has passed into fee simple private ownership, consequent to congressional action, and that there is no longer a reservation.

Some questions having arisen concerning the power of the Indian allottees to convey complete fee simple title to their allotted lands, Congress confirmed the removal of the trust restrictions against alienation of the allotted lands. 33 Stat. 565 (1904).

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Act of Congress approved March third, eighteen hundred and ninety-three (Twenty-seventh Statutes, page six hundred and thirty-three), authorizing the sale of the Puyallup allotted lands, with restriction upon alienation "for a period of ten years from the date of the passage" thereof, shall be taken and construed as having expressed the consent of the United States to the removal of restriction upon alienation by said Puyallup Indians to their allotted lands from and after the expiration of said period shall be given effect of having been made without any restrictions upon the power of the allottee to alienate his land.

Conclusive evidence of congressional intent is shown by the House Committee's Report on this bill:

> This bill (H.R. 5767) is designed to give the consent of Congress to the removal of the restrictions heretofore placed on the sale of Puyallup allotted lands, and to permit said allottees to lease, encumber, grant, alien, sell and convey said lands as freely

> as any other person may sell and convey real estate. (H.R. Rep. No. 301, 58th Cong., 2d Sess. (1904)).

Attached to the report, as an exhibit, was a letter from the Commissioner of Indian Affairs expressing the view that,

> Should it become a law, it would certainly be clear to all concerned that the Government thereby gives its absolute, full, and complete consent to the removal of the restrictions mentioned.

There can be no question but that the legislation, as enacted, carried out the legislative intent.

Whether the land within the reservation remains in the possession of the original allottees, or whether it has passed into non-Indian hands, the result is the same, so far as the tribe is concerned: It has no legal interest in it. All of the land may be taxed by the state (except possibly the small tract reserved for cemetery purposes). *Goudy v. Meath*, 38 Wash. 126, 80 Pac. 295 (1905).

[4] While reservation lands are allotted and sold pursuant to an Act of Congress removing all restrictions upon alienation, there is no implied reservation of hunting and fishing rights. *United States ex rel. Marks v. Brooks*, 32 F. supp. 422 (1940), citing *Pennock v. Commissioners*, 103 U.S. 44, 48, 26 L.Ed. 367 (1881), and *Spalding v. Chandler*, 160 U.S. 394, 407, 40 L.Ed. 469, 16 Sup. Ct. 360 (1896).

The fishing rights of members of the Puyallup Tribe rest not upon any rights in the reservation lands, because these have been surrendered pursuant to the congressional action to which we have referred, but upon their "right of taking fish, at all usual and accustomed grounds and stations, . . . in common with all citizens of the Territory," derived from the Medicine Creek Treaty. We are well aware of the statement in *United States v. Winans*, 198 U.S. 371, 49 L.Ed. 1089, 25 Sup. Ct. 662 (1905), quoted in *Seufert Bros. Co. v. United States*, 249 U.S. 194, 198, 63 L.Ed. 555, 558, 39 Sup. Ct. 203 (1919):

"We will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protecton,' and counterpoise the inequality 'by the superiour justice which looks only to the substance of the right without regard to technical rules.' 119 U.S. 1; 175 U.S. 1."

[5] We would protect these treaty rights as readily and effectively as they have been protected in *Winans, supra, Seufert Bros. Co., supra,* and *United States v. Brookfield Fisheries,* 24 F. Supp. 712 (D.C. Ore. 1938), but such rights are not absolute; they do not extend to the right to fish with such gear and at such times as would destroy the fishery. The United States Supreme Court, in *Tulee v. Washington, supra,* said:

> [T]he treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here. (Footnote omitted.) (p. 684)

Consistent with this statement by the Supreme Court, this court and the Ninth Circuit Court of Appeals have passed on the regulations imposed by the Departments with an eye to determining whether the regulations concerning the manner and time of fishing then in question were necessary to the conservation of the fishery and, hence, could be enforced against Indians whose rights to fish at their usual and accustomed grounds and stations were preserved to them by treaties similar to the one before the court in the *Tulee* case.

McCauley v. Makah Indian Tribe, 128 F.2d 867, 870 (9th Cir. 1942), was tried in the district court before the decision in *Tulee* was handed down, but heard in the circuit court following that decison. The district court had entered a sweeping injunction against the enforcement of regulations interfering with the Makah Indians fishing

in the Hoko River. The case was reversed with the closing comment.

> The case seems to have been tried by both parties on the theory that the Indians had either all fishing rights on the Hoko River or only those of non-Indian citizens. It well may be that the Tulee case has decided all that the parties are seeking to determine regarding the Makah treaty provision. However, in reversing it is with permission to the appellees to amend their complaint and present the issue of their right to such claimed allowable methods of fishing, specifically described, and not by such a general term as "other Indian fishing gear," as they may be advised.

In *Makah Indian Tribe v. Schoettler*, 192 F.2d 224, 226 (9th Cir. 1951), again the Makah Indians sought an injunction against enforcement of certain regulations, and the district court dismissed the action; the Makahs appealed. The circuit court—citing the *Tulee* case, *supra*, and *Seufert Bros. Co. v. United States*, *supra*, and *United States v. Winans*, *supra*—summarily disposed of the contention which is also made here by the Departments, that the Indians had no rights against state interference which do not exist for other citizens. It quoted with approval *Tulee*, *supra*, concerning such restrictions of a purely regulatory nature relative to the time and manner of fishing outside the reservation as are necessary for the conservation of fish and then said:

> We are not here concerned, as we were in *McCauley v. Makah Indian tribe*, 9 Cir., 128 F.2d 867, with any particular form of regulation. We do not question the right to enact regulations which will permit fishing in the Hoko River to the extent that will give the Makahs their treaty right to fish there without depletion of the fall run of salmon. We hold no more than that the appellee has not sustained its burden of proof that the instant regulations preventing the Makahs from the taking of fish in the Hoko are "necessary for the conservation of fish" in the fall run of salmon in that river.

The decision of the district court is reversed and that court ordered to make and enter an order restraining the appellee from enforcing such regulations.

In *State v. McCoy*, 63 Wn.2d 421, 387 P.2d 942 (1963), we upheld a 10-day closure of all fishing on the Skagit River, designed to protect the peak of the salmon run passing through that river to the spawning grounds,[5] on the basis that the regulation was necessary to conserve chinook salmon runs in the Skagit River. In that case, McCoy, a member of the Swinomish Tribe, was arrested for fishing near the mouth of the north fork of the Skagit River. He was operating an 18-foot, 25-hp-outboard-motor boat and using a 600-foot modern nylon gill net. The superior court found that he was not fishing on the reservation, but was fishing at "usual and accustomed grounds" and acquitted him, holding that his rights under the Treaty of Point Elliott (12 Stat. 927; January 22, 1855) gave him immunity to closure regulations. We reversed the judgment and sent the case back for a new trial, directing that the court determine whether the regulation violated was necessary to conserve the fishery.

We agree with the trial court that the rule of the *McCoy* case, *supra*, is the proper one to be applied where treaty rights and state conservation regulations are in apparent conflict. The burden of proof, once the defendant has established that he is a member of a tribe having a treaty right to take fish at all "usual and accustomed grounds and stations," is on the state to show that its regulations, which limit Indian fishing rights either as to the time or manner of fishing, are reasonable and necessary to conserve the fishery.

[6] The United States did not hesitate to adopt regulations it regarded as necessary to preserve the halibut fishery. The Makah Tribe sued to recover damages for alleged deprivation of the fishing rights reserved to them under article 4 of their 1855 treaty (12 Stat. 1939) with

5. For a better understanding of the necessity of conservation regulations to conserve the salmon runs, see the opinion in the *McCoy* case, *supra*, and Judge Finley's concurring opinion in *State v. Satiacum*, 50 Wn.2d 535, *et seq.*, 314 P.2d 400 *et seq.* (1957).

the United States. The Court of Claims held that the government's regulations restricting the rights of the Makahs to fish for halibut did not amount to a breach of the treaty: *Makah Indian Tribe v. United States,* 7 Ind. Cl. Comm. 477 (1959); affirmed 151 Ct. Cl. Rep. 701 (1960); *cert. denied* 365 U.S. 879, 6 L. Ed.2d 191, 81 Sup. Ct. 1028 (1961).

The appellants have seized upon certain language in the recent case of *Maison v. Confederated Tribes of the Umatilla Indian Reservation, supra,* as establishing the rule that the particular regulation sought to be imposed by the state must be shown to be "indispensable" to the preservation and protection of the fishery sought to be regulated before it can be enforced against Indians claiming treaty rights to fish at "usual and accustomed grounds and stations."

The word "indispensable" is taken from *Tulee v. Washington, supra,* where the Supreme Court of the United States struck down a requirement for a fishing license as applied to treaty Indians.

> Viewing the treaty in this light, we are of the opinion that the state is without power to charge the Yakimas a fee for fishing. A stated purpose of the licensing act was to provide for "the support of the state government and its existing public institutions." Laws of Washington (1937) 529, 534. The license fees prescribed are regulatory as well as revenue producing. But it is clear that their regulatory purpose could be accomplished otherwise, that the imposition of license fees is not *indispensable to the effectiveness of a state conservation program.* Even though this method may be both convenient and, in its general impact, fair, it acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve. We believe that such exaction of fees as a prerequisite to the enjoyment of fishing in the "usual and accustomed places" cannot be reconciled with a fair construction of the treaty. (Italics ours)

It was the exaction of a fee for fishing which could not be reconciled with a fair construction of the treaty.

All would agree that the imposition of license fees is not indispensable to the effectiveness of a state conservation program, but such a holding is not supporting authority for the proposition that any regulation that the state adopts must be indispensable to the success of its conservation program before that regulation is applicable to treaty Indians. We are convinced that the Supreme Court did not set up such an impossible standard in *Tulee*, nor did it intend to. The real holding in that case is

> [T]hat, while the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here. (Footnote omitted.) (p. 684)

Tulee and other Supreme Court decisions recognize that the state must have the necessary power of appropriate regulation to preserve a resource for the benefit of all of the people of the state. *New York ex rel. Kennedy v. Becker*, 241 U.S. 556, 60 L. Ed. 1166, 36 Sup. Ct. 705 (1916); *United States v. Winans, supra.*

We are convinced that the three judges of the 9th Circuit Court of Appeals, who decided the *Maison* case, *supra*, read too much into the Supreme Court's use of the word "indispensable" in the *Tulee* case and have created therefrom a completely unworkable standard for determining what regulations relative to the time and manner of fishing outside the reservation may be imposed on Indians claiming treaty rights.

It would make the competent exercise of the state's inherent power of preservation an impossibility. In *New York ex rel. Kennedy v. Becker, supra*, the United States Supreme Court discussed the reserved rights of the Seneca Indians to fish in the waters on land ceded by them to Robert Morris by the treaty of the "Big Tree" of September 15, 1797[6] (7 Stat. 601). Mr. Justice Hughes,

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6. Ratified by the Senate on April 11, 1798, and proclaimed by the President.

in an opinion adopted by the court after his resignation in 1916, said:

> It is said that the State would regulate the whites and that the Indian tribe would regulate its members, but if neither could exercise authority with respect to the other at the *locus in quo*, either would be free to destroy the subject of the power. Such a duality of sovereignty instead of maintaining in each the essential power of preservation would in fact deny it to both.
>
> It has frequently been said that treaties with the Indians should be construed in the sense in which the Indians understood them. But it is idle to suppose that there was any actual anticipation at the time the treaty was made of the conditions now existing to which the legislation in question was addressed. Adopted when game was plentiful—when the cultivation contemplated by the whites was not expected to interfere with its abundance—it can hardly be supposed that the thought of the Indians was concerned with the necessary exercise of inherent power under modern conditions for the preservation of wild life. But the existence of the sovereignty of the State was well understood, and this conception involved all that was necessarily implied in that sovereignty, whether fully appreciated or not. We do not think that it is a proper construction of the reservation in the conveyance to regard it as an attempt either to reserve sovereign prerogative or so to divide the inherent power of preservation as to make its competent exercise impossible. Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject nevertheless to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the State over the lands where the privilege was exercised. This was clearly recognized in *United States v. Winans*, 198 U.S. 371, 384, where the court in sustaining the fishing rights of the Indians on the Columbia River, under the provisions of the treaty between the United States and the Yakima Indians, ratified in 1859, said (referring

to the authority of the State of Washington): "Nor does it" (that is, the right of 'taking fish at all usual and accustomed places') "restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised." (pp. 563, 564)

Attention is particularly directed to the quotation from *United States v. Winans, supra*, at the end of the foregoing quotation.

In summary: We have rejected the Departments' argument that the Indian treaties are of no force and effect and that the state may repudiate them at will.

We have ruled that the trial court had no jurisdiction to determine whether or not there had been a termination of the Puyallup Indian Tribe, and that the tribe continues to exist, at least so long as it is recognized as such by the appropriate agencies of the United States, or until Congress passes a termination act.

We have agreed with the trial court that there is no longer a Puyallup Indian Reservation, and that the Puyallup Indians no longer have any special or treaty rights to fish thereon because it was once a reservation; however, we hold that they continue to have a right to fish at usual and accustomed grounds and stations and that any regulations of the Departments limiting or restricting those rights must be reasonable and necessary for the preservation of the fishery.

The state has clearly met that test, at least to the extent that it has established that continued use by the defendants of their drift nets and set nets would result in the nearly complete destruction of the anadromous fish runs in the Puyallup River and that a regulation prohibiting the use of such nets was necessary for the preservation of the fishery.

We are, therefore, in accord with the conclusion of the trial court that an injunction should be entered in this case; however, the injunction entered by the trial court is much too broad. It permanently enjoins individual de-

fendants and members of the federal organization known as the "Puyallup Tribe" from fishing in the Puyallup River watershed and Commencement Bay in any manner that is contrary to the rules and regulations of the Department of Fisheries of the State of Washington and the Department of Game of the State of Washington. It is predicated on the trial court's determination that the defendants have no treaty rights.

The cause must be remanded to the trial court for the entry of a judgment and decree predicated upon the proposition that the defendants do have treaty rights, but that they are subject to conservation regulations which are reasonable and necessary to preserve the fishery.

The essence of this opinion is—and the decree, as reframed, should so reflect: (1) If a defendant proves that he is a member of the Puyallup Tribe; and (2) He is fishing at one of the usual and accustomed fishing places of that tribe; (3) He cannot be restrained or enjoined from doing so, unless he is violating a statute, or regulation of the Departments promulgated thereunder, which has been established to be reasonable and necessary for the conservation of the fishery.

The injunction should be tailored to the particular situation. A specific act or acts should be enjoined on the basis that there has been a violation of a statute or statutes, or a regulation or regulations promulgated thereunder, and that such regulation or regulations are reasonable and necessary for the preservation of the fishery. The findings, conclusions, and judgment in this case should be rewritten to show clearly the basis and the extent of the injunction.

The judgment and decree appealed from is set aside, and the cause is remanded for the purposes indicated in this opinion.

Neither the appellants nor the respondents having prevailed to the full extent of their claims, each will bear its own costs on this appeal.

FINLEY, C. J., WEAVER, and HAMILTON, J. J., and LANGENBACH, J. Pro Tem., concur.

DONWORTH, J. (concurring in part and dissenting in part)—I concur in the result reached in the majority opinion in so far as it holds that appellants in this case do have treaty rights and have standing to assert those rights in this suit, but I do not agree that the test of their right to fish is dependent on the existence or nonexistence of a state statute or regulation which has been held by the trial court to be reasonable and necessary for the conservation of fish.

I would reverse the trial court's degree of permanent injunction with directions to dismiss the action for any one or all of the three reasons stated below.

I.

I am of the opinion that:

(1) The provisions of article 3 of the Treaty of Medicine Creek are presently the supreme law of the land and are superior to the exercise of the state's police power respecting the regulation of fishing by Indians at places where the treaty is applicable.

(2) If the Secretary of the Interior and the Commissioner of Indian Affairs have adopted the proposed rules relating to off-reservation fishing by treaty Indians, the Federal Government has assumed control of the matters in controversy in this case, and state courts may not enjoin appellants from fishing in the Puyallup River. See 30 Fed. Reg. 8969.

(3) Assuming, arguendo, that the trial court had power to enjoin such fishing, the findings of fact do not support the conclusions of law or the permanent injunction entered by it. In my opinion, this statement is correct regardless of whether the "indispensable" test or the "reasonable and necessary" test be applied.

My views on the rights of treaty Indians to fish "at all usual and accustomed grounds and stations" are stated at some length in the first opinion (signed by four judges)

in *State v. Satiacum*, 50 Wn.2d 513, 314 P.2d 400 (1957), and in my dissenting opinion in *State v. McCoy*, 63 Wn.2d 421, 387 P.2d 942 (1963). See the decisions of the courts of last resort quoted and discussed therein.

In the interest of brevity, I incorporate those two opinions herein by reference as a part of this opinion. In those opinions, it was stated that, under the federal constitution, the treaty was the supreme law of the land and would continue to be until:

> (1) the treaty is modified or abrogated by act of Congress, or
>
> (2) the treaty is voluntarily abandoned by the Puyallup tribe, or
>
> (3) the supreme court of the United States reverses or modifies our decision in this case. (at 529)

In the last 9 years since the two *Satiacum* decisions were filed none of these events have taken place. Nor have respondents sought a final solution of the problem through any branch of the United States Government—legislative, executive, or the Supreme Court.

II.

In the case at bar, the United States has for the first time appeared in this court and filed a brief as amicus curiae. Its counsel participated in the oral argument.

The United States contends in its brief that the trial court's permanent injunction fails to give *any* recognition to the rights secured to the Indians by article 3 of the Treaty of Medicine Creek. After citing cases relating to this contention, the government's brief states:

> . . . It is enough at this point to note that the permanent injunction against fishing in the instant case, except in accordance with the regulations applicable to all, absolutely ignores the treaty-reserved rights of these Indians. Conclusion of Law IV, *supra*, is plainly contrary to *Tulee*. For this reason alone, the judgment and decree must be reversed.

It is further argued therein that the scope of the treaty-reserved rights of the Indians may best be determined by a federal authority. The reasons supporting this argument are stated as follows:

> We must start with the established principle that interpretation of a treaty with an Indian tribe, like a treaty with a foreign nation, presents a federal question. *Worcester v. Georgia*, 6 Pet. 515 (1832). Had the Treaty itself, or Congress in contemporary or subsequent legislation, more specifically defined the right reserved or regulated how it was to be exercised (which would be another way of defining its scope), there would be no problem today. For, clearly, the federal statute would prevail, and no state law or regulation could impinge upon the Indians' exercise of the right as defined or regulated. See *Missouri v. Holland*, 252 U.S. 416 (1920), where the Supreme Court rejected the argument that implementing legislation pursuant to a treaty interfered with exercise of state regulatory provisions as to wildlife.

The brief then states that, pursuant to congressional action, the Secretary of the Interior and the Commissioner of Indian Affairs have proposed the adoption of certain rules relating to off-reservation treaty fishing which have been published in 30 Fed. Reg. 8969. The proposed rules were signed by the Under Secretary of the Interior on July 5, 1965. Whether they have yet been officially adopted, we are not advised.

I mention the government's amicus curiae brief at some length because this is the first indication we have had of what the government's legal or administrative position is in regard to the status of the Treaty of Medicine Creek or to a departmental solution of the problems heretofore presented to this court concerning the off-reservation fishing rights of treaty Indians.

Thus, we now have official information that the legal representatives of the government take the position that an Indian treaty is the same as a treaty with a foreign nation. I presume that this means that an Indian treaty

under the Supremacy Clause of the United States Constitution is the supreme law of the land. *Cf.* first opinion in *State v. Satiacum, supra*, and cases cited therein. We are also assured that the Interior Department is proposing to take some action regarding the regulation of off-reservation fishing by treaty Indians.

III.

I desire to point out that I disagree with the majority's discussion of the holding of the Court of Appeals in *Maison v. Confederated Tribes of Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir. 1963), where that court said, at 172:

> That, in both the *Tulee* and *Makah* cases it was held that the Indians' right to fish is qualified by the state's right to regulate such fishing when necessary for conservation. But, to establish necessity the state must prove two facts: *first*, that there is a need to limit the taking of fish, *second*, that the particular regulation sought to be imposed is "indispensable" to the accomplishment of the needed limitation.
>
> Before discussing whether the defendants have sustained their burden of proof it will be helpful to briefly explain the life cycle of the salmon and steelhead fish. Such fish are anadromous; that is to say, they are born in fresh water streams, migrate to and live the greater part of their lives in the ocean and, just before dying, return to the place of their birth to spawn. The fish born in a particular stream are delicately adjusted to its peculiar characteristics and instinctively return to it at the time of the year when successful spawning can occur. Attempts at stocking barren streams have been costly and only sporadically successful, and severe decimation of a run of fish in a particular stream can result in the permanent destruction of its population. In traveling upstream to spawn many debilitating hardships are encountered, including natural predators, disease and water pollution. By the time they reach the spawning ground, the body oils of the fish are practically used up, and they are often cut, bruised, diseased, and afflicted with fungus growths.

Defendants contend that "conservation through wise use, the keynote of modern fisheries management," dictates that the plaintiffs' fishing on the spawning grounds be restricted because the value of the fish there is highest as seed stock but lowest as food.

After discussing certain testimony presented by the Oregon officials, the Court of Appeals concluded:

> However, the treaty dealt only with the rights of the plaintiffs' ancestors, and did not secure rights to any other group or class. Therefore, while a restriction of the fishing activities of the plaintiffs must be *indispensable*, as required by the treaty [*Tulee v. Washington*, *supra*], a restriction of the fishing activities of other citizens of a state is valid if merely *reasonable*, as required by the Fourteenth Amendment to the United States Constitution. *Thomson v. Dana*, 52 F.2d 759 (D. Ore. 1931), aff'd. 285 U.S. 529, 52 S.Ct. 409, 76 L.Ed. 925 (1932). The complete exclusion of sports fishermen from the spawning grounds as an alternative does not amount to arbitrary discrimination against them, because the state possesses broader power to regulate sports fishing than it does to regulate fishing by the Indians. This one of the alternatives listed by the court being available, we need not discuss the others.

The word "indispensable" is said by the majority not to be supported by the two cases cited by the Court of Appeals, to wit, *Tulee v. Washington*, 315 U.S. 681, 86 L.Ed. 1115, 62 Sup. Ct. 862, and *Makah Indian Tribe v. Schoettler*, 192 F.2d 224 (9th Cir. 1951). However, the United States Supreme Court denied the state of Oregon's petition for certiorari in the *Maison* case (375 U.S. 829, 11 L.Ed.2d 60, 84 Sup. Ct. 73).

While the denial of certiorari is not to be considered as an expression of approval of the lower court's decision, the *Maison* case involved the interpretation of a treaty which under the Supremacy Clause of the United States Constitution is the supreme law of the land, and hence

could be authoritatively interpreted only by the United States Supreme Court. If the word "indispensable," in the context in which the court of appeals used it in the *Maison* case, substantially changed the meaning of the treaty as to the state's power of regulation of Indian fishing rights, one would suppose that, in view of the many conflicting decisions of various state and federal courts on this vital subject, the Supreme Court would have granted certiorari.[7]

The *Maison* decision was followed by Judge Solomon sitting in the United States District Court for the District of Oregon in *Confederated Tribes of the Umatilla Indian Reservation v. Maison*, —— F. Supp. — —(decided August 8, 1966). This case involved the right of treaty Indians to hunt game. The language of the treaty involved was similar to the treaty in the case now before us. In upholding the Indians' right under the treaty to hunt game, Judge Solomon said:

> In *Confederated Tribes of the Umatilla Indian Reservation v. Maison, et al.*, 186 F. Supp. 519, 520, I construed this article to mean that the State may not restrict the off-reservation fishing rights, set forth in the treaty without showing that such restriction was necessary for conservation of the fish. The Court of Appeals in affirming this decision laid down the test to be applied to State-imposed restrictions of treaty rights:
>
> ". . . while a restriction of the fishing activities of the plaintiffs must be *indispensable*, ... a restriction of the fishing activities of other citizens is valid if merely *reasonable* . . ." (314 F.2d 169, 174 emphasis is original).
>
> . . .
>
> In other words, defendants here contend that in spite of the provisions of the treaty, the Indians have no greater rights to fish and hunt off their reservation

7. This is the second time that the United States Supreme Court has failed to grant a petition for certiorari which sought an authoritative ruling on the status of an Indian treaty with respect to state police power. See discussion of *State v. Arthur*, 74 Ida. 251, 261 P.2d 135 (1953), found in *State v. Satiacum*, 50 Wn.2d at pages 525-529.

than any other Oregon citizen. This contention was made and rejected in *United States v. Winans*, 198 U.S. 371 (1905); *Tulee v. Washington*, 315 U.S. 681 (1942); and *Makah Indian Tribe v. Schoettler*, 192 F.2d 224 (9th Cir. 1951).

. . .

No one disagrees with the defendants' argument that regulation of fish and game resources is necessary and desirable, and that an intolerable situation would arise if all citizens were permitted to fish or hunt without restriction. However, the issue here is whether a State is permitted to proscribe or limit the treaty rights of Indians without showing that such restriction is indispensable. *Confederated Tribes, supra.*

Until the Supreme Court holds that the term "indispensable" is not the correct test to be used in determining the validity of state laws and regulations vis-a-vis the fishing rights of treaty Indians, I think that this court should not read the word out of the *Maison* decision and substitute "reasonable and necessary" therefor.

Even if the rule approved by the majority decision in the case at bar is followed (*i.e.* that the state has the burden of proving that its regulations are reasonable and necessary to conserve the fishery), I see no need for a further hearing.

The trial court stated in its memorandum decision that the total amount of salmon caught by Indians in the entire state in 1964 was only between 3 per cent and 5 per cent of the total number taken by Indians and non-Indians.

The trial court found the facts as to the fishing activities of appellants to be:

XIII. That the individual defendants began openly fishing the Puyallup River in 1953 contrary to the laws, rules and regulations of the State of Washington. Since that time, the defendants have gradually increased the intensity of their drift net and set net fisheries, using modern nylon monofilament nets, to the point that the

anadromous fish runs of the Puyallup River are presently unable to maintain themselves in an abundant supply without supplemental plantings by the state.

XIV. The Puyallup River from Commencement Bay to its upper tributaries constitutes and is a prime spawning and rearing area for anadromous fish.

XV. The defendants have indicated that unless restrained from so doing, they will continue to fish in the Puyallup River and Commencement Bay in the manner in which their fishing activities have taken place since 1953.

XVI. That the place, time, and manner of fishing by the defendants was and is in violation of the rules, and regulations of the State of Washington. That the fishing activities of the defendants, if allowed to proceed unrestrained could result in the destruction or serious impairment of the anadromous fish runs of the Puyallup River.

XVII. That once anadromous fish runs in a river system have been destroyed, it is generally impossible to reestablish them.

XVIII. It is reasonable and necessary that state conservation, rules and regulations be uniformly applied to all citizens on an equal basis including the defendants.

The ultimate finding of fact is that the fishing activities of appellants, if not restrained, *could* result in the destruction or serious impairment of the anadromous fish runs on the Puyallup River.

The above quoted findings do not, in my opinion, support the conclusion that:

> It is reasonable and necessary that state conservation rules and regulations be uniformly applied to all citizens on an equal basis including the defendants.

Neither do they justify the entry of the trial court's judgment and decree which contained the following injunctive provision:

It is hereby Ordered, Adjudged, and Decreed That:

The individual defendants and all members of the federal organization known as the "Puyallup Tribe" are hereby permanently enjoined from fishing in the Puyallup River watershed and Commencement Bay in any manner that is contrary to the laws of the State of Washington or contrary to the rules and regulations of the Department of Fisheries of the State of Washington and the Department of Game of the State of Washington.

I agree with the following statement made in the brief of the amici curiae Association on American Indian Affairs, Inc., as to the effect of the trial court's permanent injunction quoted above wherein it is said:

> The decision below concerning the purported nonexistence of the Puyallup Tribe today is novel, wholly contrary to well-established principles of Indian law, and completely at odds with sound public policy. In the first place, only Congress, and clearly not the State courts, has power to effect the termination of tribal status. *Creek County v. Seber*, 318 U.S. 705, 718 (1943); *United States v. McGowan*, 302 U.S. 535, 538 (1938); *United States v. Nice*, 241 U.S. 591, 598 (1916); *United States v. Sandoval*, 231 U.S. 28 (1913). Indeed, the rule that sole responsibility for declaring when tribal existence has ended is vested in Congress has particular pertinence in this case where withdrawal of recognition from the Puyallup Tribe (at least in the view of the lower court) effectively would abrogate a solemn treaty commitment of the United States.

As indicated above, I likewise agree with the closing statement in the brief of the amicus curiae Association of Indian Affairs, Inc., which states:

> The Superior Court's Findings of Fact and Conclusions of Law clearly fail to measure up to this standard. Neither the findings nor the memorandum deal

with the critical question—i.e., whether the State could accomplish its conservation objectives through more rigorous regulation of non-Indian fishing or by other means not having an impact upon appellants. Similarly, the court below appears not to have considered whether preservation of the Puyallup River fishery, assuming the need for regulation, requires so severe a curtailment of Indian fishing as the respondents here seek to impose. Such disregard for the applicable law, particularly as enunciated by the United States Court of Appeals for this Circuit, cannot be allowed to stand.

In summary, unlike their non-Indian fellow-citizens, enrolled members of the Puyallup Tribe have a vested property right under the Treaty of Medicine Creek to fish at all usual and accustomed places outside their reservation. This off-reservation right to take fish, so essential to the Indians' very existence, is protected under Federal law, and, at the very least, may be limited by State law only under extraordinary circumstances. As a matter of law, the Washington conservation statutes and regulations may not be enforced against Indian treaty fishing rights in the same manner as they are against the bare fishing privileges of other persons. In the former situation, unlike the latter, the State of Washington has the burden of proving affirmatively that application to appellants of the attempted regulations is indispensable to the conservation of the fish resource and the task of further proving that the desired conservation goals cannot be achieved in some other fashion. Respondents made no such showing in the lower court.

Unless it be held that Indian treaties are not treaties within the meaning of the Supremacy Clause of the United States Constitution and hence are not the supreme law of the land and do not override the police power of the states (contrary to the holding of the Supreme Court, cited below),[8] I can only reach the conclusion that the judgment and decree of the trial court should be reversed with directions to dismiss the action.

8. See cases discussed in the first *Satiacum* opinion (50 Wn.2d at pages 516-519).

In *State v. Quigley*, 52 Wn.2d 234, 324 P.2d 827 (1958), a case in

I am further of the opinion that respondents have failed to prove either that the state laws and regulations here involved are *either* indispensable or reasonably necessary to the conservation of salmon fishery on the Puyallup River and hence would reverse and dismiss for that reason.

HUNTER, J. (dissenting)—I dissent. The ultimate holding of the majority is that the Puyallup Indians are subject to *regulations reasonable and necessary* for the preservation of the fishery. The majority's modification of the trial court's injunction when read with this holding is not consistent. The trial court properly applied our existing conservation laws to the Puyallup Indians by its injunction. The power of the state of Washington to regulate fishing for purposes of conservation has been clearly recognized as applying to the Indians *equally with others* by the United States Supreme Court in the case of *Tulee v. Washington*, 315 U.S. 681, 684, 86 L.Ed. 1115, 1119, 62 Sup. Ct. 862, 864 (1941). In this case Justice Black for the court stated:

> We think the state's construction of the treaty is too narrow and the appellant's too broad; that, while *the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish*, it forecloses the state from charging the Indians a fee of the kind in question here. (Italics mine.)

Our present laws and regulations relating to the use of gear, and the time and place of taking fish are for no other purpose than the reasonable and necessary preservation of the fishery. These laws and regulations accomplish the purpose of the ultimate holding of the majority and there-

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which a non-treaty Indian claimed the right to hunt deer on his own property without a hunting license, this court, in a unanimous en banc opinion concluded with this dictum: "Of course, a treaty takes precedence over a state law, but appellant has no treaty rights that restrict the state in its exercise of the police power. Our question, therefore, must be answered in the affirmative."

fore should have been imposed on the Indians *equally with others* as was done by the trial court.

In my opinion the ultimate holding of the majority is consistent with the injunction entered by the trial court, and there is no need for its modification.

ROSELLINI and HALE, JJ., concur with HUNTER, J.

HALE, J. (concurring in the dissent)—I agree with and have signed Judge Hunter's dissenting opinion. As a preface to further comment, it should be noted that this case has nothing to do with protecting or preserving for the Indians any rights in land or personal property or fostering their management of business or tribal affairs. It involves only the claims of a right to fish in places where all others are forbidden.

Appellants assert the right under a treaty to violate the laws of a sovereign state, laws designed to preserve, protect and develop a great natural resource that contributes vastly to the economic and recreational welfare of millions of its citizens. Appellants claim powers which, if exercised in full, will inevitably destroy this resource in the Puyallup River.

I find no language in the Treaty of Medicine Creek (10 Stat. 1132) concluded December 26, 1854, by Isaac I. Stevens, Governor and Superintendent of Indian Affairs of the Territory of Washington, on behalf of the United States and the "chiefs, headmen, and delegates of the Nisqually, Puyallup, Steilacoom, Squawskin, S'Homamish, Stehchass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians,"[9] warranting the conclusion that the Indians should be forever immune from the state's game and fishery laws. The most cogent language of the treaty, that particular phraseology designed to prevent unfair and invidious discrimination against the Indians and which vouchsafed to them the right to hunt and fish, granted these very rights *in common with all citizens of the territory*. See Treaty with Nisqualli, Puyallup, Etc., 1854, art. 3, 2 Indian Affairs, Laws and Treaties 496 (1902). As I would permit no discrimination against the

9. 2 Indian Affairs, Laws and Treaties 495 (1902).

descendants of the Puyallups, I would allow no discrimination in their favor either.

In my opinion, most of the decisional law written about Indian treaties, although intended to protect the American Indian in the rights to property and the pursuit of happiness, has had a contrary effect. Decisions relating to Indian treaties begin with the hope of protecting the Indian, and inevitably end by treating the Indians as aborigines, and in doing so not only have tended to degrade the Indian and perpetuate the stigma of second-class citizenship earlier surrounding him but blinded this country to the need for legislation which will genuinely rehabilitate our Indian-citizens and enable them to play a full and active role in the affairs of this state and country in common with all citizens of whatever racial origin.

The majority decision fosters an illusion that somehow by regarding the Treaty of 1854 as a device to confer upon shareholder members in appellant, The Puyallup Tribe, Inc., special privileges, immunities and emoluments not shared equally with descendants of the white settlers of 1854 or the citizenry at large, the courts are righting a wrong long suffered by the Indians.

But while intending otherwise, the opinion discriminates in favor of the Indians, granting to a few of them special favors, privileges and immunities not claimed or shared by other Indians, and perpetuating the idea that a treaty with the natives in 1854 is a viable compact with their remote descendants. In holding thus, the decision again delays the day when some descendants of the Puyallups will achieve full responsibility as citizens. I would put an end to such an invidious and discriminatory concept, and read the treaty as it was written.

Next, on the question of tribal existence, I think the evidence establishes and the learned trial judge rightly found that appellant, The Puyallup Tribe, Inc., never acquired nor now has any rights under the treaty. I believe that the tribe or band which signed the Treaty of Medicine Creek of 1854 has long since disappeared, its

lands sold and descendants absorbed into the body politic and that the conclusion of the learned trial judge that

> There is no presently existing Puyallup Tribe of Indians which succeeds in interest to the original Puyallup Indian Tribe which was signatory to the Treaty of Medicine Creek.

is well supported by both the history of the tribe and the evidence in the case. This finding and the judgment should be affirmed.

THE DEPARTMENT OF GAME *et al.*, *Respondents*, *v.* NUGENT KAUTZ *et al.*, *Appellants*.*

[1] **Fish—Indians—Courts—Jurisdiction—Indian Treaties.** The fact that the defense to an action alleging violation of state conservation laws was a claim of immunity from such laws under a treaty between Indian tribes and the United States, did not divest a superior court of this state of jurisdiction to hear and determine the issue and provide appropriate relief.

HUNTER, ROSELLINI, and HALE, JJ., dissent. DONWORTH, J., dissents in part.

Appeal from a judgment of the Superior Court for Pierce County, No. 158824, John D. Cochran, J., entered August 13, 1965. *Affirmed as modified.*

Action for injunctive relief. Defendants appeal from a judgment in favor of the plaintiffs.

Jack E. Tanner, for appellants.

The Attorney General, *Joseph L. Coniff*, and *Mike Johnston*, *Assistants*, for respondents.

HILL, J.—This is an action by the Department of Game of the State of Washington and the Department of Fisheries of the State of Washington, hereinafter called the Departments, against 12 named individuals and a John Doe, all of whom it is alleged, "have threatened and are fishing extensively in the Nisqually River with set nets and drift nets," under a claim of special privileges or immunities from the conservation laws of the State of Washington.

The Departments alleged that if the defendants' net fishing was permitted to continue the anadromous fish[1] runs of the Nisqually River would be virtually exterminated.

The Departments sought a judgment, holding that the defendants are not entitled to any privileges or immunities from the application of state conservation measures, and that they be restrained from netting anadromous fish in the Nisqually River or any of its tributaries.

The Nisqually Tribe[2] and the Puyallup Tribe, with numerous others, were signators to the Treaty of Medicine Creek and entitled to certain rights thereunder, which rights have previously been discussed in the companion case (No. 38011) filed this day involving the Puyallup Tribe of Indians (70 W.D.2d 241,—P.2d—).

In this case, there is no question as to the continuation of the Nisqually Tribe or as to the existence of the Nisqually Indian Reservation.

It is stipulated that the defendants are Nisqually Indians and that "usual and accustomed fishing grounds"[3] (withing the meaning of the Treaty of Medicine Creek) encompass the whole of the Nisqually River and its tributaries downstream from the reservation.

It is stipulated further:

4) The defendants began engaging in an open net

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1. For an understanding of an "anadromous" fish, see opinions by Judge Rosellini in *State v. McCoy*, 63 Wn.2d 421 at page 426 *et seq.*, 387 P.2d 942 (1963), and his concurring opinion in *State v. Satiacum*, 50 Wn.2d 513, 531 *et seq.*, 314 P.2d 400 (1957).

2. The Nisqually Tribe was not made a defendant in this action. The trial court entered an order "that the Nisqually Indian Tribe be and is hereby joined as a party defendant to this cause and it is further ordered that they be so summoned." The only proof of being "summoned" is that a copy of the order was served on the wife of the chairman of the Nisqually Indian Community Council at his residence. The tribe never appeared; no default was ever entered.

3. The Medicine Creek Treaty refers to "all usual and accustomed fishing grounds and stations."

fishery for salmon and steelhead at the usual and accustomed grounds in 1960, and have, since that date, continued to fish contrary to state fishing conservation laws and regulations.

5) If permitted to continue, the defendants' commercial fishery would virtually exterminate the salmon and steelhead fish runs of the Nisqually River.

6) The plaintiffs have expended a substantial amount of public monies to maintain the anadromous fish runs of the Nisqually River and it is necessary for proper conservation of the salmon and steelhead fish runs of the Nisqually River [within the meaning of *State v. McCoy*, 63 Wn.2d 423 (1963)] that the plaintiffs enforce state fishery conservation laws and regulations to the fishing activities of the defendants at their usual and accustomed grounds.

We have here the extreme case: It is stipulated that the "defendants' commercial fishery would virtually exterminate the salmon and steelhead fish runs of the Nisqually River"; that the enforcement of the conservation laws and regulations are necessary for the proper conservation of the salmon and steelhead fish runs; nevertheless, the defendants asserted in the trial court and assert here that their right to fish as they please is not subject to any interference by the Departments. They challenged the jurisdiction of the superior court to consider the cause of action and its right to restrict in any way their treaty rights.

The superior court held that it did have jurisdiction to hear the matter and permanently enjoined the defendants[4] from fishing in the Nisqually River watershed without the boundaries of the Nisqually Reservation in any manner that is contrary to the laws of the State of Washington or contrary to the rules and regulations of the Departments.

4. The state asserts in its brief (p. 4) that the Nisqually Tribe was joined as an additional party defendant and is bound by the injunction. See Note 2 for the only indication in the record that the tribe was made a party defendant. We do not pass upon the issue of whether the tribe is included in the defendants, who are enjoined.

[1] We agree with the trial court that it did have jurisdiction to hear the cause and to enter its order. When Indians seek to enjoin claimed interference with their treaty rights, they usually invoke the jurisdiction of the federal courts, as did the Makah Tribe in the *Schoettler*[5] and *McCauley*[6] cases, and the Confederated Tribes of the Umatilla Reservation in the *Maison*[7] case.

When a state seeks to enforce its laws and the regulations made thereunder, in furtherance of its police power, to conserve its fish and game, it invokes the jurisdiction of the state court as in the *Tulee*,[8] *Becker*,[9] and *Race Horse*[10] cases, and the claimed interference with treaty rights becomes a matter of defense.

The United States brought one action to enforce Indian treaty rights in our territorial court, [11] and another in the Circuit Court of the United States for the District of Washington.[12]

In the final analysis, irrespective of which route has been pursued—federal courts or territorial and state courts—the Supreme Court of the United States can be requested to determine the rights of the contesting parties, if an interpretation of a treaty between an Indian tribe and the United States is involved.

We find nothing in any of the cases dealing with Indian treaty rights which would indicate that a state does not have jurisdiction over a violation of its conservation

5. *Makah Indian Tribe v. Schoettler*, 192 F.2d 224 (9th Cir. 1951).

6. *McCauley v. Makah Indian Tribe*, 128 F.2d 867 (9th Cir. 1942).

7. *Maison v. Confederated Tribes of the Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir. 1963).

8. *Tulee v. Washington*, 315 U. S. 681, 86 L. Ed. 1115, 62 Sup. Ct. 862 (1941).

9. *New York ex rel. Kennedy v. Becker*, 241 U. S. 556, 60 L. Ed. 1116, 36 Sup. Ct. 705 (1916).

10. *Ward v. Race Horse*, 163 U. S. 504 (1896).

11. *United States v. Taylor*, 3 Wash. Terr. 88 (1887).

12. *United States v. Winans*, 198 U. S. 371, 49 L. Ed. 1089, 25 Sup. Ct. 662 (1905).

laws or the regulations issued thereunder by an Indian at a locus in quo within the state and outside a reservation. Should the state trial court and this court fail to properly interpret the off-reservation treaty rights of an Indian, the Supreme Court of the United States is available for a final determination. A state court has the right to be wrong in such a case, and we find no support for the challenge of the defendants to the jurisdiction of the superior court.

We have considered in the companion *Puyallup* case, *supra*, the extent of the right of Indians to fish at "all usual and accustomed grounds and stations," accorded them by the various treaties, and have concluded that their off-reservation fishing rights are—together with those of other citizens of the state—subject to regulations necessary for the preservation of the fishery. Repetition of that discussion would seem to be unnecessary.

The defendants having stipulated that their commercial fishing, if permitted to continue, would virtually exterminate the salmon and steelhead fish runs; and that the enforcement of the regulations of the Departments is necessary for proper conservation of the salmon and steelhead fish runs, it would follow that their fishing in violation of those regulations should be enjoined.

Apparently the reason for an appeal, in the face of such stipulations, is to raise the jurisdictional issue (already disposed of) and the issue raised by the language in the opinion in *Maison v. Confederated Tribes of the Umatilla Indian Reservation* (See note 7), which would place upon the state the burden of showing that its particular regulation or regulations limiting the off-reservation fishing rights reserved by the treaties[13] must be "indispensable" to accomplish the purpose for which they are intended—the preservation of the fishery.

We have, in the *Puyallup* case, *supra*, indicated our

13. Whether the off-reservation fishing rights are reserved to the Indians by the treaty, or granted to them by the treaty, may become of importance. Our own Territorial Supreme Court (see note 11) in an opinion written by Associate Justice John P. Hoyt in 1887, held that they were reserved rights; and the Supreme Court of the United States expressed the same view in *United States v. Winans* (see note 12).

disagreement with the "indispensable" test and our adherence to the "reasonable and necessary" test, as stated in *State v. McCoy* (see note 1).

While we agree that under the stipulation an injunction was proper, it should not be permanent. The stipulation was not that *all future* state conservation laws and regulations will be necessary for the proper conservation of the salmon and steelhead fish runs, and the injunction should apply only to violations of the statutes and regulations, stipulated to be presently necessary to the conservation of the salmon and steelhead fish runs on the Nisqually River. In view of the scope of the stipulations, the tailoring of the injunction to meet a specific situation, as in the *Puyallup* case, *supra*, is not necessary.

The cause will be remanded to the superior court for a proper limitation of the injunction. The respondents will recover their costs on this appeal, the remand not being on any issue raised by the appellants.

FINLEY, C. J., WEAVER and HAMILTON, JJ., and LANGENBACH, J. Pro Tem., concur.

DONWORTH, J. (concurring in part and dissenting in part)—This case involves the treaty rights of the appellant Nisqually Indians to fish at the usual and accustomed fishing grounds and stations under the Treaty of Medicine Creek.

I agree with the majority in holding that the trial court had jurisdiction of this controversy, but I do not agree with the majority's disposition of this case for the reasons stated by me in the companion case (No. 38611) involving the Puyallup Tribe (70 W.D.2d 241).

In the instant case, appellants have stipulated to the facts quoted in the majority opinion. It seems ironic that appellants in this case have thus admitted facts which, in my opinion, the respondent state departments were unable to prove by a preponderance of the evidence in the *Puyallup* case.

Nevertheless, I would reverse the trial court's injunctive decree and direct that the action be dismissed for the

three reasons which I stated in the *Puyallup* cases. Even with the facts admitted in the stipulation, the reasons which I discussed therein are still applicable to the present case.

The majority opinion states that, if this court fails to interpret correctly appellants' treaty rights to fish off the reservation, the United States Supreme Court is available for a final determination of the case. This is theoretically true, but we should not overlook the fact that the Supreme Court has twice declined to review either of two cases (one from a state supreme court and one from a United States court of appeals) in which the constitutional status of a similar Indian treaty was brought into question.

See *State v. Arthur*, 74 Ida. 251, 261 P.2d 135 (1953), in which certiorari was denied 347 U.S. 937, 98 L.Ed. 1087, 74 Sup. Ct. 627 (1954), and *Maison v. Confederated Tribes of the Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir. 1963), in which certiorari was denied 375 U.S. 829, 11 L.Ed.2d 60, 84 Sup. Ct. 73 (1968).

Nevertheless, the important questions involved in the present two companion cases would seem to justify an authoritative determination of the constitutional status of these Indian treaties by the only tribunal competent to finally decide them.

HUNTER, J. (dissenting)—I dissent to the modification of the trial court's injunction for the same reasons stated in my dissent to *Department of Game v. Puyallup Tribe*, 70 W.D.2d 241,—P.2d—(1967).

ROSELLINI and HALE, JJ., concur with HUNTER, J.

No. 38497. En Banc. January 12, 1967.

THE STATE OF WASHINGTON, *Respondent*, v. HERMAN MOSES *et al.*, *Appellants*, THE DEPARTMENT OF FISHERIES *et al.*, *Respondents*.*

[1] **Appeal and Error—Compliance With Rules—Belated Correction.** An appellant's failure to assign error to any findings of fact, which

under ROA 43 results in the trial court's findings being accepted as the established facts of the case, cannot be corrected by assigning error to, and setting out verbatim, certain findings in a reply brief.

[2] **Indians—Treaties—Nonsigners.** The descendants of a tribe of Indians which was named in the Point Elliott Treaty but was not a signator to the treaty, have no rights under the treaty and have no immunity of any sort from compliance with state conservation laws as a result of such treaty.

[3] **Judgment—Res Judicata—Concurrence of Issues.** A determination in a criminal cause could not be res judicata of any issue arising in a subsequent equity case involving different parties and issues.

HUNTER and HALE, JJ., dissent.

Appeal from a judgment of the Superior Court for King County, No. 609180, F. A. Walterskirchen, J., entered February 11, 1965. *Affirmed.*

Action for injunctive relief. Defendants appeal from a judgment in favor of the plaintiff.

Frederick W. Post, for appellants.

Charles O. Carroll, Jack A. Richey, The Attorney General and *Joseph L. Coniff, Assistant*, for respondents.

HILL, J.—This is an action involving claimed off-reservation treaty fishing rights by Indian defendants; and it is a companion case to that of the Puyallup Indians (70 W.D.2d 241, — P.2d —), and of the Nisqually Indians (70 W.D.2d 270, — P.2d —), filed today but presenting a different facet of the problem.

The action was commenced by the State of Washington on the relation of Charles O. Carroll, as Prosecuting Attorney of King County, Washington, against 15 individual defendants, asking that they be enjoined from obstructing fish runs on the Green River and its tributaries. It was alleged that the defendants were sweeping the river with fish nets and preventing any substantial escapement and that, unless enjoined, the run of the fish in the river would be depleted and cease to exist. Thereafter the Department of Fisheries of the State of Washington and the Department of Game of the State of Washington, hereinafter called the Departments, intervened as plaintiffs.

The individual defendants answered, as did the Muckleshoot Tribe, alleging that all of the defendants were members of that tribe and were, in fishing on the Green River, exercising their rights under article 5 of the Point Elliott Treaty of January 22, 1855 (12 Stat. 927).[1]

The prayer of the answer also asked:

A. For a decree declaring that the Muckleshoot Tribe is composed of Indians who are descendants of three of the bands of Indians mentioned in the preamble to the Point Elliott Treaty as the Smalh-kahmish, Skope-ahmish, and St-kahmish; that said bands are parties to the said treaty; and that under its present name of Muckleshoot the tribe and its members are entitled to fish on the Green River within the area of its ancestral lands described above, in the usual and accustomed manner employed by the three said bands during "pre-white times."

B. Judgment against the State of Washington in the sum of $3,180,000 for damages sustained through loss of use of its (Muckleshoot Tribe's) fishing location on "Soos" Creek since the year 1901; a decree enjoining the State of Washington officials from preventing the Muckleshoot Tribe from fishing at "Soos" Creek fish hatchery location, or in the alternative, that it have judgment in the sum of $1,500,000.

At the trial, 36 witnesses testified[2] and 53 exhibits were offered. The trial court made some 31 findings of fact and entered a decree permanently enjoining the individual defendants and all members of the Muckleshoot Tribe from fishing in the Green River in any manner that is contrary to the rules and regulations of the Departments.

From this decree, entered on January 11, 1965, the individual defendants and the Muckleshoot Tribe gave timely notice of appeal.

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1. "The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands, Provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens."

Not until April 13, 1966, some 14 months later, did the appellants file a brief. Five assignments of error were made, and will be discussed.

The respondents in their brief called attention to the fact that no error had been assigned by the appellants to any of the 31 findings of fact made by the superior court and invoked Rule on Appeal 43,[3] which provides that the findings of fact made by the trial court will be accepted as the established facts in the case unless error is assigned thereto.

[1] The appellants filed a reply brief setting out verbatim 15 findings of fact to which error was assigned. A like effort, in *Hill v. Tacoma*, 40 Wn.2d 718, 246 P.2d 458, to belatedly comply with that rule in a reply brief, was unsuccessful. In *Paulson v. Higgins*, 43 Wn.2d 81, 83, 260 P.2d 318 (1953), we stated:

> This court has held without exception that failure to comply with Rule 43, *supra*, will make the findings of fact the established facts of the case. (Citing 19 cases.)
>
> If there is to be a rule, there must be a point at which failure to comply therewith can no longer be corrected. *That point is the filing of respondent's brief.* (Italics ours.)

The findings of fact made by the superior court must be accepted as the established facts of this case. We shall refer to them only as they may be of assistance in understanding the holdings of the trial court.

A brief statement of the basis for the superior court's judgment and decree will be helpful as a background for consideration of the assignments of error.

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2. The two-volume Statement of Facts contained in excess of 550 pages of testimony.

3. "No alleged error of the superior court will be considered by this court unless the same be definitely pointed out in the 'assignments of error' in appellant's brief. In appeals from all actions at law or in equity tried to the court without a jury, the findings of fact made by the court will be accepted as the established facts in the case unless error is assigned thereto. No error assigned to any finding or findings of fact made or refused will be considered unless so much of the finding or findings as is claimed to be erroneous shall be set out verbatim in the brief. . . ." Rule on Appeal 43.

1. The trial court concluded that the Muckleshoot Tribe of Indians, as such, had no rights under the Point Elliott Treaty.[4] The undisputed evidence was that there never was such an aboriginal tribe; it was made up of a number of different tribes and bands which were placed on an abandoned military post at a place known as "Muckleshoot Prairie" at times subsequent to the Point Elliott Treaty. (It was conceded by counsel at the oral argument that the name "Muckleshoot" was not Indian; that the "Muckle" came from the Scotch, and that it was the name given to a particular locality.) Not until the 1860-69 decade can any reference be found to this synthetically created tribe as the "Muckleshoots," and not until 1870 were the Indians on this reservation first referred to (in United States Agency correspondence) as the "Muckleshoot Tribe."

Nor is there support in the record for the contention (see A of the prayer of defendants, page 277 of this opinion) that all of the present Muckleshoot Tribe is descended from three bands of Indians mentioned in the preamble of the Point Elliott Treaty (*i.e.*, Smalh-kahmish, Skope-ahmish, and St-kahmish) "as being contracting parties."

Although mentioned in the treaty, there is no contention that any of the three named tribes was signator thereto. It is suggested, but not established, that Chief Seattle signed for them. While after the signature[5] of each Indian on the treaty there appeared the name of the specific tribe or tribes he represented, to some were added the words "and other tribes," or "and other allied tribes." Chief Seattle signed only as "Chief of the Dwamish and Suquamish Tribes."

2. The trial court concluded that the 15 individual defendants were descendants of the Skope-ahmish Tribe,

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4. It would appear that the Muckleshoot Tribe, as such, is not certain whether its members are treaty Indians. In its claim, filed with the Indian Claims Commission, its representation was that its members were not treaty Indians, and it asked compensation for the unlawful taking of tribal lands. See 79 Ct. Cl. 589 (1934).

5. All signed with an "X."

supra, but that they had no rights under the treaty because the Skope-ahmish Tribe did not sign the treaty and no one signed it in its behalf. Finding of Fact No. 20 was:

That the Skope-ahmish Indians were named in the preface of the Treaty of Point Elliott but they did not sign the treaty and no other Indians signed on their behalf.

3. The trial court concluded that if the individual defendants did have rights under the Point Elliott Treaty, they were subject to restriction in the exercise of those fishing rights by state conservation regulations which were reasonable and necessary to the conservation of the fishery, and that their net fishing was in violation of such regulations.

[2] With reference to these three conclusions of the trial court, it seems to us clearly established that the then nonexistent Muckleshoot Tribe, as such, had no treaty rights; that the individual defendants, as Skope-ahmish descendants, failed to establish that their tribe was signatory to the Point Elliott Treaty and, hence, failed to establish that they had any right thereunder.

Had they established such rights, it would have been necessary, as in the *Puyallup* case, *supra*, to limit the injunction to their particular methods of fishing which threatened the continued existence of the fishery; but not having established the existence of any treaty rights, they, like all other citizens, are subject to the conservation regulations adopted by the Departments and, hence, the injunction as entered is proper.

Having discussed the overriding issues, we now turn to a consideration of the five assignments of error made by the appellants.

The first assignment is that the trial court erred in not accepting the testimony of George M. Felshaw, Superintendent of the Western Washington Indian Agency, Bureau of Indian Affairs, to the effect that the Muckleshoot Tribe were treaty Indians.

We agree with the trial court that it was not bound by the opinion of Mr. Felshaw, or his testimony as to the views of his superiors that the members of the Muckleshoot Tribe are treaty Indians—the evidence being undisputed that such a tribe was not even in existence at the time the treaty was signed. Nor does the fact that three of the numerous groups that became part of the Muckleshoot Tribe were named in the Treaty of Point Elliott but did not sign it, confer treaty status on all members of the Muckleshoot Tribe.

The second assignment of error is that the trial court refused to permit Malcolm S. McLeod to testify.

Mr. McLeod did testify at length with reference to certain matters, and identified certain exhibits. It was only as an expert that his further testimony would have been of value to the defendants. In view of the fact that the trial court found the individual defendants to be descendants of the Skope-ahmish Tribe and members of that tribe for the purposes of this action, the failure to permit Mr. McLeod to testify as an anthropological expert was not prejudicial. There was nothing in the offer of proof to indicate to the trial court in what way his qualifications as an historical expert would be material.

The trial court quite frankly advised counsel that it could not give any weight to Mr. McLeod's expert testimony, stating:

> I am satisfied that he is so intimately connected with it [litigation concerning Indian rights and compensation for the taking thereof] that it would be a waste of your time and the Court's time to have his testimony taken.
>
> . . . .
>
> You can't live with something, as Mr. McLeod has done for a great number of years, without being biased and prejudiced in favor of it. That is human nature. And the Court will so have to discount his testimony. It wouldn't be fair to your clients to have him used.

There was an overnight recess, following the refusal of

the trial court to permit Mr. McLeod to testify, which gave the defendants an opportunity to secure other expert testimony if they so desired. No prejudice has been shown by the failure to permit Mr. McLeod to testify as an expert.

The third assignment of error is the refusal of the trial court to be bound by the rule of law stated by the United States Circuit Court in *Maison v. Confederated Tribes of the Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir. 1963): That the regulation of fishing by Indians having treaty rights is permissible only when such regulation can be shown to be "indispensable" to the conservation of the fishery.

We do not reach this particular assignment of error under the holding that neither the individual defendants nor the Muckleshoot Tribe have any rights under the Treaty of Point Elliott.

However, if the defendants had established fishing rights under the treaty, we would agree with the trial court that a requirement that a state regulation must be "indispensable" to the conservation of the fishery before it can be enforced against treaty Indians is neither good law nor presently binding upon the State of Washington. This issue has been discussed in the companion *Puyallup* case, *supra*, filed this day, and repetition of the views therein expressed is unnecessary. The trial court applied the proper rule in determining whether the regulations were such as could be enforced as against the treaty rights of the individual defendants to fish "at usual and accustomed grounds and stations."

The fourth assignment of error is that the trial court failed to recognize "That the Muckleshoots Are Treaty Indians Is Established by the Doctrine of *Res Adjudicata*."

[3] The contention—that the status of the Muckleshoots, as treaty Indians, was established by a superior court holding to that effect (in a criminal action that never reached the Supreme Court)—is completely without merit. The nature of the action is different—an equity

case instead of a criminal case; the parties are different; the issues are different; and the status of persons for or against whom the claim is made is different. See *State ex rel. Cooper v. Warnock*, 16 Wn.2d 697, 134 P.2d 706 (1943), and cases cited therein.

The fifth and final assignment of error was the dismissal of the defendants' counterclaim.

When the trial court held that the Muckleshoot Tribe, as such, had no treaty with the United States, the dismissal of its counterclaim for $3,180,000 and $1,500,000 necessarily followed. Claims against the state were not filed; but we do not pass upon the further contention by the respondents that such claims against the state must be filed as a prerequisite to any action thereon (R.C.W. 4.92.110).

The decree appealed from is affirmed.

FINLEY, C. J., WEAVER, ROSELLINI and HAMILTON JJ., and LANGENBACH, J. Pro Tem., concur.

DONWORTH, J. (concurring in the result)—Since, because of appellants' failure to comply with Rule on Appeal 43, this court must accept the trial court's findings of fact as the established facts of this case, the only result that can be reached is that appellants do not have, and never have had, any rights under the Treaty of Point Elliott, and hence there is no legal basis for appellants' claim. *State v. Quigley*, 52 Wn.2d 234, 324 P.2d 827 (1958).

Appellants are in no different position with respect to fishing rights than non-Indians are. I, therefore, concur in the affirmance of the trial court's injunctive decree.

HUNTER, J. (dissenting)—I dissent. The issue of recognizing the "Muckleshoots" as descendants of the signatories of the treaties of 1854 and 1855 is necessarily a federal question. This court is acting without jurisdiction in making that determination.

HALE, J. concurs with HUNTER, J.

APPENDIX C

• • •

75.12.020 Taking or molesting fish at or near racks, dams. It shall be unlawful to catch, kill, or in any manner menace, maim or destroy, any food fish at any rack, dam or other obstruction or in the waters and on the beaches within one mile below any rack, dam or other obstruction when the same are within the territorial limits of the state of Washington or in waters of the Columbia River over which this state has concurrent jurisdiction, unless otherwise specified in the orders of the director. [1955 c 12 § 75.12.020. Prior: 1949 c 112 § 37; Rem. Supp. 1949 § 5780-311.]

• • •

75.12.070 Shooting, gaffing, etc., food or shellfish. Unless otherwise provided for in the regulations of the director, it shall be unlawful to shoot, gaff, snag, snare, spear, stone, or otherwise molest any food fish or shellfish in any of the waters of the state. [1955 c 12 § 75.12.070. Prior: 1949 c 112 § 38; Rem. Supp. 1949 § 5780-312.]

• • •

75.12.100 Purchase, etc., of food or shellfish taken unlawfully. It shall be unlawful for any person to purchase, handle, deal in, sell, or have in his possession any food fish or shellfish which were taken from any of the waters of this state contrary to the provisions of the fisheries code or the regulations of the director. [1955 c 12 § 75.12.100. Prior: 1949 c 112 § 34; Rem. Supp. 1949 §5780-308.]

• • •

75.08.080 Rules and regulations—Scope. The director shall investigate the habits, supply and economic use of, and classify, the food fish and shellfish in the waters of the state and the offshore waters, and from time to time, make, adopt, amend, and promulgate rules and regulations as follows:

(1) Specifying the times when the taking of any or all

the various classes of food fish and shellfish is lawful or prohibited.

(2) Specifying and defining the areas, places, and waters in which the taking and possession of the various classes of food fish and shellfish is lawful or prohibited.

(3) Specifying and defining the types and sizes of gear, appliances, or other means that may be lawfully used in taking the various classes of food fish and shellfish, and specifying the times, places, and manner in which it shall be lawful to possess or use the same.

(4) Regulating the possession, disposal, and sale of food fish and shellfish within the state, whether acquired within or without the state, and specifying the times when the possession, disposal, or sale of the various species of food fish or shellfish is prohibited.

(5) Regulating the prevention and suppression of all infectious, contagious, dangerous, and communicable diseases and pests affecting food fish and shellfish.

(6) The fixing of the size, sex, numbers, and amounts of the various classes of food fish and shellfish that may be taken, possessed, sold, or disposed of.

(7) Regulating the landing of the various classes of food fish and shellfish or parts thereof within the state.

(8) Regulating the destruction of predatory seals and sea lions and other predators destructive of food fish or shellfish, and specifying the proof of the destruction of the same that shall be required.

(9) Specifying the statistical and biological reports that shall be required from licensed or nonlicensed fishermen, dealers, boathouses, handlers, or processors of food fish and shellfish.

(10) Specifying which species of marine and freshwater life are food fish and shellfish.

(11) Classifying the species of food fish and shellfish or parts thereof that may be used for purposes other than human consumption.

(12) Promulgating such other rules and regulations as may be necessary to carry out the provisions of this title and the purposes and duties of the department.

Subdivisions (1), (2), (3), (4), (6), and (7), shall not apply to licensed oyster farms or oysters produced thereon. [1955 c 12 § 75.08.080. Prior: 1949 c 112 § 6, part; Rem. Supp. 1949 § 5780-205, part.]

• • •

WAC 220-12-001 PROMULGATION. In order to protect, preserve, perpetuate and manage the fishery resouces of the state of Washington the following rules, regulations and controls are hereby promulgated; and

Now, therefore, I, Thor C. Tollefson, the director of fisheries of the state of Washington, by virtue of authority in me vested by section 6, chapter 112, Laws of 1949, R.C.W. 75.08.080, do hereby make, adopt and promulgate the following rules and regulations and controls governing the taking and possession of food fish and shellfish.

WAC 220-20-010 UNLAWFUL ACTS. (1) It shall be unlawful to take, fish for, possess or transport for any purpose food fish, shellfish or parts thereof, in or from any of the waters or lands over which the state of Washington has jurisdiction, or from the waters of the Pacific Ocean, except at the times, places, and in the manners and for the species, quantities, sizes of sexes provided for in the regulations of the department of fisheries;

(2) It shall be unlawful for any person, corporation, business or company to have in possession or under control or custody any salmon or other food fish or shellfish within the land or water boundaries of the state of Washington, except in those areas which are open to commercial fishing or wherein the possession, control or custody of salmon or other food fish or shellfish for commercial purposes is made lawful under a statute of the State of Washington or the rules and regulations of the director of fisheries, unless otherwise provided.

• • •

APPENDIX D

• • •

Article XXVI

COMPACT WITH THE UNITED STATES

The following ordinance shall be irrevocable without the consent of the United States and the people of this state:

First. That perfect toleration of religious sentiment shall be secured and that no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship.

Second. That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States and that the lands belonging to citizens of the United States residing without the limits of this state shall never be taxed at a higher rate than the lands belonging to residents thereof; and that no taxes shall be imposed by the state on lands or property therein, belonging to or which may be hereafter purchased by the United States or reserved for use: *Provided*, That nothing in this ordinance shall preclude the state from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of congress containing a provision exempting the lands thus granted from taxation, which exemption shall continue so long and to such an extent as such act of congress may prescribe.

Third. The debts and liabilities of the Territory of Washington and payment of the same are hereby assumed by this state.

Fourth. Provision shall be made for the establishment and maintenance of systems of public schools free from sectarian control which shall be open to all the children of said state.

• • •

APPENDIX E

PROPOSED RULE MAKING

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[25 CFR Part 255]

OFF-RESERVATION TREATY FISHING

Notice of Proposed Rule Making

Notice is hereby given, pursuant to section 4(a) of the Administrative Procedure Act of June 11, 1946 (60 Stat. 237), that the Secretary of the Interior proposes to amend Title 25, Code of Federal Regulations, by adding a new Part 255—Off-Reservation Treaty Fishing. The proposed regulations are set forth in tentative form below.

The proposed regulations are to be adopted under the authority contained in section 22, Title 5, United States Code, and sections 2 and 9, Title 25, United States Code, and are intended to provide a framework within which the exercise of off-reservation fishing rights reserved to certain Indian tribes under treaties with the United States may be subjected to Federal restrictions and controls wherever required for conservation of the fishery resources.

Prior to the final adoption of the proposed regulations, consideration will be given to any data, views, or suggestions pertaining thereto which are submitted in writing to the Commissioner of Indian Affairs, Department of the Interior, Washington, D.C., 20242, within the period of 30 days from the date of publication of this notice in the FEDERAL REGISTER.

The new Part 255 reads as follows:

Sec.
255.1 Purpose.

255.2 Definitions.
255.3 Off-reservation treaty fishing permits.
255.4 Unauthorized use of permit cards—only permittees to fish.
255.5 Possession of permit card.
255.6 Identification of fishing equipment.
255.7 Area regulations.
255.8 Enforcement.
255.9 Savings provisions.

AUTHORITY: The provisions of this Part 255 issued under 25 U.S.C. 2 and 9; 5 U.S.C. 22.

§ 255.1 Purpose.

(a) The purposes of these regulations are:

(1) To assist in promoting the development, management, conservation, and protection of the Nation's fisheries resources;

(2) To assist in protecting the off-reservation fishing rights which were reserved to certain Indian tribes under their treaties with the United States;

(3) To assist in the orderly administration of Indian affairs;

(4) To remove uncertainties resulting from recent Federal and State court decisions over the precise fishing restrictions with which Indians with treaty rights must comply;

(5) To assist the States in enforcing their laws and regulations for the conservation of fish and wildlife to the extent permitted under any Federal law or treaty applicable to off-reservation fishing activities of Indians; and

(6) To facilitate consultation and cooperation between the States and the Indian tribes in the management and improvement of fisheries resources affected by such Federal laws or treaties.

(b) The following conservation regulations are found to be necessary to assure that the nonexclusive rights re-

served to certain Indians by treaty to fish at usual and accustomed places outside the boundaries of an Indian reservation shall be protected and preserved for the benefit of present and future members of such tribes and in a manner consistent with the nonexclusive character of such rights. Any exercise of an Indian off-reservation treaty fishing right shall be in accordance with these regulations, except as may be otherwise authorized by tribal regulation approved by the Secretary of the Interior or his designee or permitted by less restrictive requirements of State law.

§ 255.2 Definitions.

As used in these regulations:

(a) "Enforcement officer" means (1) any special officer of the Bureau of Indian Affairs, U.S. Game Management Agent, U.S. Fishery Management Agent or any other office or employee of the Department of the Interior or any Indian tribe authorized by the Secretary of the Interior to enforce these regulations, and (2) any officer of any State or political subdivision thereof authorized to enforce State fish or game laws if there is in effect an agreement between the Secretary of the Interior and the fish or game management agency or agencies of such State for the recognition and enforcement of these regulations;

(b) "Off-reservation treaty fishing permit," "permit," or "permit card" mean a permit or card issued pursuant to § 255.3;

(c) "Off-reservation treaty fishing rights" or "treaty right" mean any right reserved or granted to one or more Indian tribes, bands, or groups by treaty with the United States to take, cure, or possess fish at usual and accustomed places outside the boundaries of an Indian Reservation in common with others;

(d) "These regulations" means the regulations comprising this Part 255 of Title 25 of the Code of Federal Regulations together with any regulations adopted pursuant to § 255.7, and any additions thereto or amendments thereof.

§ 255.3 Off-reservation treaty fishing permits.

(a) Subject to the provisions of these regulations, the Commissioner of Indian Affairs or his designee shall, upon application therefor, issue an Indian off-reservation treaty fishing permit to any Indian whom he finds to be a member of a recognized Indian tribe having off-reservation treaty fishing rights. Such permits shall be issued for periods of not to exceed 5 years and shall be renewed upon application so long as the holder remains entitled to off-reservation fishing rights.

(b) Effective January 1, 1968, no such permit shall be issued to any person who is not on an official membership roll of the tribe, which has been approved by the Secretary of the Interior. Prior to that date, the Commissioner of Indian Affairs or his designee may issue such a permit to any person who submits evidence of his entitlement thereto satisfactory to the issuing officer. Any person claiming to have been wrongfully denied a permit may appeal the decision of the issuing officer to the Commissioner of Indian Affairs.

(c) Each permit card shall be evidence that the lawful holder is entitled to the off-reservation treaty fishing rights identified in said permit, to be exercised as provided in these regulations.

(d) No charge or fee of any kind shall be imposed for the issuance of an off-reservation treaty fishing permit, provided that this shall not prevent any Indian tribe from imposing any fee or tax upon the exercise of any tribal fishing right.

(e) No person shall be issued a permit or permits on the basis of membership in more than one tribe at any one time.

(f) All permit cards issued pursuant to these regulations shall be and remain the property of the United States and may be retaken by any enforcement officer from any unauthorized holder (including the permittee during any period for which the permit may have been suspended or revoked pursuant to these regulations). Any

card so retaken shall be immediately forwarded to the officer who issued it.

(g) Each permit card issued under these regulations shall specify the period for which it is effective and shall state the name, address, tribal affiliation and enrollment number (if any) of the holder, identify the treaty under which the holder is entitled to fishing rights, contain such additional personal identification data as may be required on fishing licenses issued under the law of the State or States within which it is valid, and be signed by the issuing officer and countersigned by holder.

(h) Upon the revocation or suspension of the off-reservation treaty fishing privileges of the holder of a permit by any court of Indian Offenses or tribal court for violation of any tribal fishing ordinance incorporating or adopting the regulations in this Part 255 and approved by the Secretary of the Interior, any such permit issued hereunder may be revoked or suspended for a like period. No permit shall be issued to any person whose off-reservation treaty fishing privileges may have been suspended or revoked by such court, during the period of such suspension or revocation.

§ 255.4 Unauthorized use of permit cards—only permittees to fish.

(a) No permit holder shall allow any use of his permit card by any other person. Any use of another's permit card by any Indian subject to these regulations shall constitute a violation of these regulations.

(b) Whenever exercising off-reservation treaty fishing rights no Indian shall allow anyone other than a holder of a currently valid permit under these regulations to fish for him, to use gear marked pursuant to these regulations, or to assist him in fishing.

§ 255.5 Possession of permit card.

Any Indian fishing under an off-reservation treaty fishing right shall have a currently valid off-reservation treaty fishing permit card in his immediate personal possession

while so fishing, or while having in his possession outside an Indian reservation any fish so caught. He shall upon demand display the permit card to any enforcement officer.

§ 255.6 Identification of fishing equipment.

All fishing gear or other equipment used in the exercise of any off-reservation treaty fishing right and not in the immediate personal possession of such Indian shall be marked in such manner as shall be prescribed in regulations issued pursuant to § 255.7 to disclose the identity of its owner or user.

§ 255.7 Area regulations.

(a) The Commissioner of Indian Affairs and the Commissioner of Fish and Wildlife shall from time to time jointly recommend to the Secretary of the Interior specific conservation regulations to govern Indian off-reservation treaty fishing for areas found by them to be in need of Federal restrictions on Indian fishing as a means of assuring the conservation and wise utilization of the fishery resources for the benefit of the Indians and other persons entitled to the enjoyment thereof. Such regulations shall be designed to prevent, in conjunction with appropriate State conservation regulations governing fishing by persons not fishing under treaty rights, the depletion or impairment of the fishery resources.

(b) In formulating their recommendations for regulations to be promulgated by the Secretary of the Interior, the two Commissioners shall seek the views of the affected Indian tribes, of the fishery conservation agency of any affected State, or of other interested persons as may desire to participate in the proposed rule making. A general notice of proposed rule making shall be published in the FEDERAL REGISTER to afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally as may be determined by the Secretary of the Interior. Following the expiration of the time allowed for the submission of written data, views, or arguments, the final recommenda-

tions of the Commissioners shall be submitted to the Secretary of the Interior for appropriate action. Such of the recommended regulations or modifications thereof as the Secretary shall adopt shall become effective on such date as the Secretary of the Interior shall prescribe.

(c) Any regulations issued pursuant to this section shall contain provisions for invoking temporary emergency closures or restrictions or the relaxation thereof at the field level when necessary or appropriate to meet conditions not foreseeable at the time the regulations were issued.

(d) Regulations issued pursuant to this § 255.7 may include such requirements for recording and reporting catch statistics as the Secretary of the Interior deems necessary for effective fishery management.

§ 255.8 Enforcement.

(a) Any fishing or related activity which is contrary to the provisions of the regulations in this Part 255 and the laws of the State in which it occurs shall be deemed to be outside the scope of any off-reservation treaty fishing rights, and the offender shall be subject to arrest and prosecution under State law: *Provided*, That this paragraph (a) shall not apply to Indians fishing within any Indian reservation or within reservation boundary waters in which an Indian tribe has exclusive fishing rights.

(b) Any unattended fishing gear which is not marked or labeled for identification as required by the regulations in this Part 255 shall be presumed not to be used in the exercise of an off-reservation treaty fishing right and shall be subject to control or seizure under State law.

§ 255.9 Savings provisions.

Nothing in these regulations (25 CFR Part 255) shall be deemed to:

(a) Prohibit or restrict any persons from engaging in any fishing activity in any manner which is permitted under State law;

(b) Deprive any Indian or any Indian tribe, band or group of any right which may be secured to him or to it by any treaty or other law of the United States;

(c) Permit any Indian to exercise any tribal fishing right in any manner prohibited by any ordinance or regulation of his tribe;

(d) Enlarge the right, privilege, or immunity of any person to engage in any fishing activity granted or reserved by treaty with the United States;

(e) Exempt any person or any fishing gear, equipment, boat, vehicle, fish, or fish products, or other property from the requirements of any law or regulation pertaining to safety, obstruction of navigable waters, national defense, security of public property, pollution, health and sanitation, or registration of boats or vehicles; or

(f) Abrogate or modify the effect of any agreement affecting fishing practices entered into between any Indian tribe and the United States, or any State, or agency of either.

JOHN A. CARVER, JR.,
Under Secretary of the Interior,

JULY 5, 1965.

[F.R. Doc. 65-7523; Filed, July 15, 1965; 8:47 a.m.]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 246

HERMAN MOSES, ROBERT ALLEN, JR., LARRY MAURICE, LAWRENCE JERRY, DONALD JERRY, STAN MOSES, BURT MOSES, EDWIN B. DANIELS, HOWARD MOSES, BETTY GOUDY, HENRY KING GEORGE, WALTER ALLEN, ANDY DOMINICK, ARCHIE LEBEHAN, CECIL MOSES, and the MUCKLESHOOT TRIBE OF INDIANS,
Appellants,

v.

THE STATE OF WASHINGTON, THE DEPARTMENT OF FISHERIES, and THE DEPARTMENT OF GAME,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

SUPPLEMENTAL JURISDICTIONAL STATEMENT

Since the filing of the Jurisdictional Statement herein, the Secretary of the Interior has at long last asserted federal jurisdiction over off-reservation fishing rights by way of his regulations issued July 10, 1967, and filed with the Federal Register on July 14, 1967, F.R. Doc. 67-8185, and published in Federal Register, Vol. 32, No. 136, page

10433 *et seq.*, pertinent parts of which follow this statement. Instead of the regulations printed in the appendix of the Jurisdictional Statement at page A-59, where the Secretary merely informed the world he was thinking of issuing regulations, the Secretary has now ripened such thought into a direct recognition of his power. Basically, the Secretary, in his regulations, has offered to regulate off-reservation fishing rights on the invitation of an interested party, for example, the tribe involved or the governor of the state. Thereafter, specific regulations will be promulgated for a specific area for the management of the fishery resource in the light of proper conservation and harvesting.

The appellant tribe has complied with the regulation by requesting the Secretary for such specific regulations. The request is printed following this Statement.

On a plenary hearing we would assert that the regulating of off-reservation fishing rights encompasses the power to so regulate.

Respectfully submitted,

FREDERICK PAUL
Counsel for Appellants

FREDERICK POST
Of Counsel

RESOLUTION

WHEREAS, We, the Muckleshoot Tribe of Indians, and its constituent tribes, including the Smalh-kamish, Skope-ahmish, and St-kah-mish, wholeheartedly approve of the conservation of the salmon fisheries, both on and off the reservation; and

WHEREAS, we ceded to the United States large areas of our lands, reserving our fishing rights; and

WHEREAS, the State of Washington has carried on a relentless campaign, first to prevent our fishing at all and lately to deny all treaty rights to us; and

WHEREAS, we think it morally wrong that the State permit the commercial and sports fishermen to intercept the salmon which would normally spawn in our old places, requiring us to carry the full burden of conservation; and

WHEREAS, the Secretary of the Interior has at long last offered to regulate our off-reservation fishing rights (as well as other tribes'); and

WHEREAS, we have been terribly hurt by the conduct of the State of Washington and we expect only blind determination from her to extinguish our rights in our beloved salmon, no matter what, in any way she can; and

WHEREAS, we express our confidence in the fairness of the Secretary of the Interior, now, therefore,

BE IT RESOLVED at a joint meeting of the members of the Muckleshoot Tribe of Indians and its tribal council that the tribe wholeheartedly embrace regulation by the Secretary of the Interior of its off-reservation fishing rights and that its officers be authorized to do any and every act to accomplish the same and to cooperate with the Secretary of the Interior in the promulgation of specific regulations for the management of the off-reservation fishing rights of the Muckleshoot Tribe of Indians.

DATED this 14th day of August, 1967.

S/ BERTHA MCJOE

CHAIRMAN, MUCKLESHOOT TRIBAL COUNCIL

S/ ALETHA WHITE

SECRETARY, MUCKLESHOOT TRIBAL COUNCIL

Excerpts from Title 25, Federal Register, Vol. 32, No. 136, page 10433, *et seq.*

"Sec. 256.1 Purpose.

(a) The purposes of these regulations (Part 256) are:

(1) To assist in protecting the off-reservation non-exclusive fishing rights which are secured to certain Indian tribes by their treaties with the United States;

(2) To promote the proper management, conservation and protection of fisheries resources which are subject to such treaties of the United States;

(3) To provide for the determination of restrictions on the manner of exercising nonexclusive fishing privileges under rights secured to Indian tribes by such treaties of the United States necessary for conservation of the fisheries resources;

(4) To assist in the orderly administration of Indian Affairs;

(5) To encourage consultation and cooperation between the states and Indian tribes in the management and improvement of fisheries resources affected by such treaties;

(6) To assist the states in enforcing their laws and regulations for the management and conservation of fisheries resources in a manner compatible with the treaties of the United States which are applicable to such resources.

(b) The conservation regulations of this Part 256 are found to be necessary to assure that the nonexclusive rights secured to certain Indian tribes by treaties of the United States to fish at usual and accustomed places outside the boundaries of an Indian reservation shall be protected and preserved for the benefit of present and future members of such tribes in a manner consistent with the nonexclusive character of such rights. Any exercise of an Indian off-reservation treaty fishing right shall be in accordance with this Part 256 and any applicable area regulations issued hereunder.

"Sec. 256.2 Area Regulations.

(a) The Secretary of the Interior may upon request of an Indian tribe, request of a State Governor, or upon his own motion, and upon finding that Federal regulation of Indian fishing in any waters in which Indians have a treaty-secured nonexclusive

fishing right is necessary to assure the conservation and wise utilization of the fishery resources for the present and future use and enjoyment of the Indians and other persons entitled thereto, promulgate regulations to govern the exercise of such treaty-secured fishing right in such waters for the purpose of preventing, in conjunction with appropriate State conservation laws and regulations governing fishing by persons not fishing under treaty rights, the deterioration of the fishery resources.

(b) In formulating such regulations the Secretary of the Interior may incorporate such State laws or regulations, or such tribal regulations as have been approved by the Commissioner of Indian Affairs, as he finds to be consistent with the Indians' rights under the Treaty and the conservation of the fishery resources.

• • •

Sec. 256.7 Savings provisions.

Nothing in this Part 256 shall be deemed to:

• • •

(b) Deprive any Indian tribe, band, or group of any right which may be secured it by any treaty or other law of the United States;

• • •

(d) Enlarge the right, privilege, or immunity of any person to engage in any fishing activity beyond that granted or reserved by treaty with the United States;

(e) Exempt any person or any fishing gear, equipment, boat, vehicle, fish or fish products, or other property from the requirements of any law or regulation pertaining to safety, obstruction of navigable waters, national defense, security of public property, pollution, health and sanitation, or registration of boats or vehicles;"

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Appellants,

v.

THE STATE OF WASHINGTON, THE DEPARTMENT OF FISHERIES, and THE DEPARTMENT OF GAME,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

SECOND SUPPLEMENTAL JURISDICTIONAL STATEMENT

On Tuesday, October 3, 1967, Washington State Fisheries' agents arrested four members of the appellant tribe, Henry Kinggeorge, Stanley Moses, Kenneth Cross, and George Cross, members of the Skope-ahmish constituent tribe, for harvesting twenty-seven Chinook and

one silver salmon on the Green River at one of their accustomed fishing locations. The four members of the Muckleshoot Tribe wanted to eat the salmon and perhaps sell a few with which to buy other staples (the modern version of bartering). Their forty-foot gillnet and their salmon were confiscated, and bail was fixed at $500.00 apiece. Informal efforts to waive bail were rejected by the prosecuting attorney of King County. One was able to make bail some 14 hours later and the other three made bail the next day.

The appellant tribe submits that the instant problem is live and vibrant and should be settled authoritatively.

Respectfully submitted,

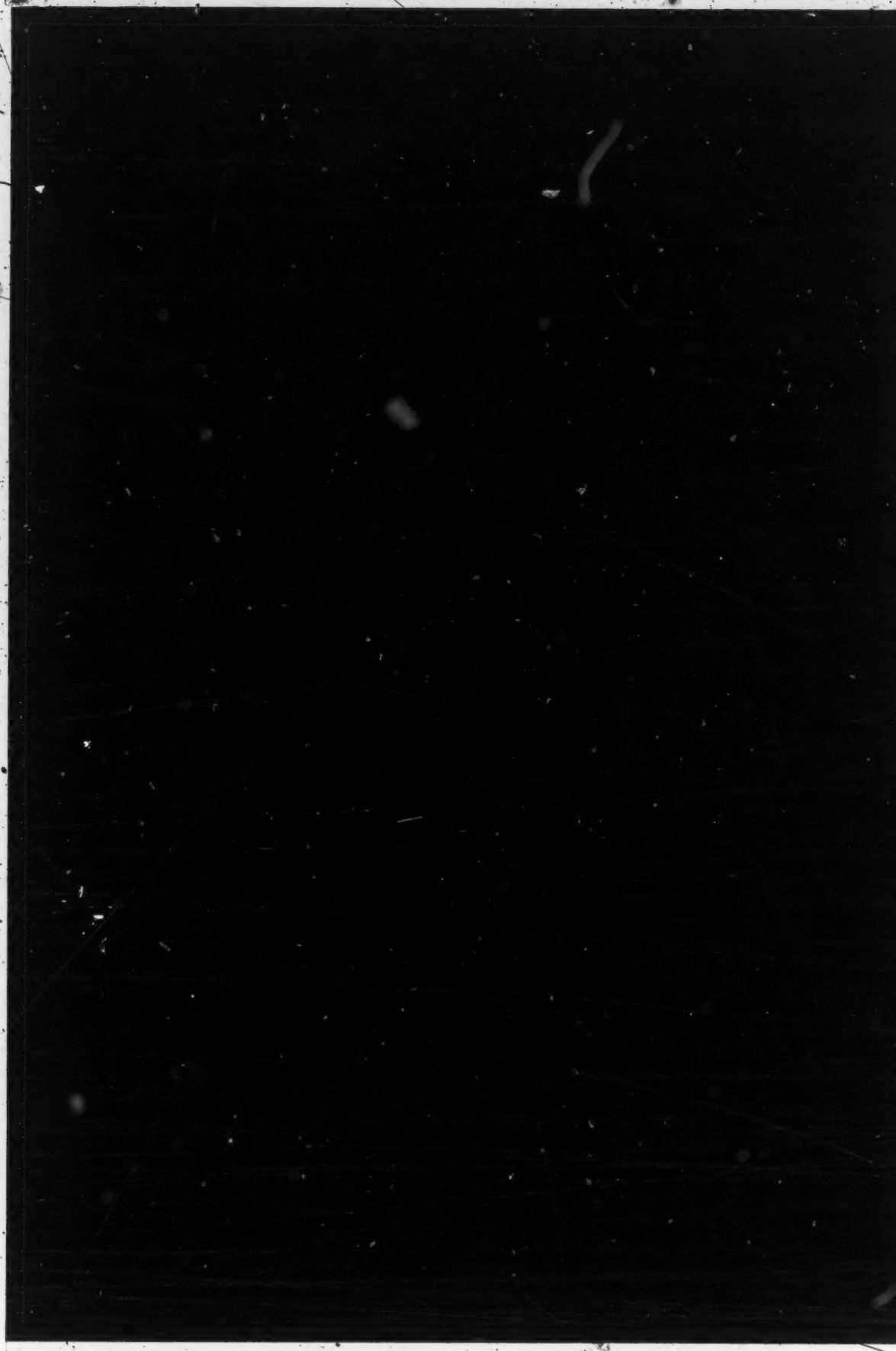
L. FREDERICK PAUL
Counsel for Appellants

FREDERICK POST
Of Counsel

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Appellants,

v.

THE STATE OF WASHINGTON, THE DEPARTMENT OF FISHERIES, and THE DEPARTMENT OF GAME,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS APPEAL

The Appellee in the above-entitled case moves to dismiss the appeal from the Supreme Court of the State of Washington on the following grounds:

(1) The appeal is not within the jurisdiction of this court because not taken in conformity to statute or court rule.

(2) The appeal does not present a substantial federal question.

(3) The federal questions sought to be reviewed were not timely nor properly raised, or passed on by the courts of the state of Washington.

STATEMENT

The Green River is located in King County, Washington. No part of the river flows through the Muckleshoot Indian Reservation, which is also located in King County, Washington. In September of 1963 a number of Muckleshoot Indians began net-fishing openly on the Green River.

On September 27, 1963, the King County Superior Court issued a temporary restraining order against 15 named Indians prohibiting the removal of food fish from the Green River. The court later enjoined any fishing on the Green River pending a trial on the merits. The complaint stated that continued net fishing was an unreasonable use of the river in that it would deplete the number of fish within the river, and thus constituted a public nuisance.

The case was removed to the United States District Court for the Western District of Washington, and remanded to the state court on October 28, 1963.

The defendants answered the complaint by requesting an order granting them special privileges and immunities from the operation of state law by reason of the Point Elliott Treaty, and asserting counterclaims for $3,180,000 and $1,500,000. The Muckleshoot Tribe of Indians was joined as a party defendant, and the State of Washington Departments of Fisheries and Game intervened as parties plaintiff.

A trial on the merits lasted from November 24 to December 3, 1964. At its conclusion the court entered 31 Findings of Fact and 7 Conclusions of Law, holding that the defendants were not members of a tribe which was signatory to the Treaty of Point Elliott, and that the continued fishing practices of the defendants would

"ultimately destroy the effectiveness of the state's conservation program." A permanent injunction was signed on February 11, 1965.

The case was then appealed to the Supreme Court of the State of Washington. Appellants claimed five assignments of error: (1) Refusal of the trial court to be bound by the testimony of George Felshaw; (2) Refusal of the trial court to permit the testimony of Malcolm McLeod as to historical facts; (3) Refusal of the trial court to apply the indispensability test to the regulation of taking of game and fish by Indians; (4) Refusal to apply the rule of *res adjudicata;* and (5) Dismissal of cross-complaint for damages. No constitutional issues were raised at that time.

The State Supreme Court affirmed the trial court on January 12, 1967, holding that the defendants had failed to prove that they were members of a tribe that was signatory to the Point Elliott Treaty. *State of Washington v. Herman Moses, et al.*, 70 W.D.2d 276, 422 P.2d 775 (1967). Appellants then took appeal to this court.

ARGUMENT

I.

The Appeal Is Not Within the Jurisdiction of This Court, Because Not Taken in Conformity to Statute or Court Rule

The jurisdictional grounds for an appeal to this court from a decision of a state Supreme Court are set out in 28 U.S.C., § 1257. A perusal of the opinion of the Supreme Court of the State of Washington, as set out in Appellants' Jurisdictional Statement at A-45 to A-53, indicates that the court below did not *consider* the validity or invalidity of a treaty or statute of the United States, much less rule against the same. The court below

in fact recognized the validity of the Treaty of Point Elliott, and affirmed the trial court's holding that appellants did not show that they are members of any tribe which was signatory to that treaty. At best, appellants' argument rests upon a denial of a claim under the Treaty of Point Elliott. This has been held insufficient to give this court jurisdiction by appeal, *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 78 Sup. Ct. 1174, 2 L.ed.2d 1313 (1957).

Neither did the court below construe the constitutionality of any state statute. Appellant's brief in the court below did not explicitly challenge any state statute. Several state statutes are cited in Appellant's Jurisdictional Statement, at A-54 to A-56, however these statutes have not been presented to the State Supreme Court for a decision as to validity or invalidity. In the absence of such a challenge, and subsequent court construction upholding validity, there is no jurisdiction by appeal.

Appellant cites *Worcester v. Georgia*, 31 U.S. 515, 6 Pet. 515 (1832), in support of his jurisdictional statement. That case offers no support for appelant's contention of jurisdiction herein. The *Worcester* case involved a writ of error to the United State Supreme Court, the instant case is an appeal. The former case involved state regulation of non-Indians residing on Indian land (the Cherokee reservation), the present case deals with the regulation of off-reservation fishing. The defendant in *Worcester* attacked the constitutionality of the statute involved in his answer. In this case no statute has been attacked on constitutional grounds prior to Appellants' Jurisdictional Statement herein.

II.

The Appeal Does Not Present a Substantial Federal Question

Appellant lists five questions in support of the substantiality of the federal claim asserted (Jurisdictional Statement, pages 5-6, 9-18), yet does not point to any specific provision of the U.S. Constitution in support thereof. Question one deals with an issue of fact which was not assigned as error in the court below. Questions two, four and five deal with issues not presented to the court below for consideration. The court below did not need to meet question three because of the holding therein. That question was not necessary to the determination of the case. While the case of *The Department of Game v. The Puyallup Tribe*, 70 W.D.2d 241, 422 P.2d 754 (1967), which is set out in Appellants' Jurisdictional Statement at pp: A-9 to A-39, does consider this issue, the holding in the present case in the State Supreme Court was not based upon the *Puyallup* case. Appellant seeks his appeal because of issues raised in another case.

III.

The Federal Questions Sought To Be Reviewed Were Not Timely Nor Properly Raised, Or Passed on by the Courts of the State of Washington

The opinion of the State Supreme Court is set out in Appellants' Jurisdictional Statement at pages A-45 to A-53. Five assignments of error were presented to that court: (1) Refusal of the trial court to be bound by the testimony of George Felshaw; (2) Refusal of the trial court to permit the testimony of Malcolm McLeod as to historical facts; (3) Refusal of the trial court to apply the indispensability test to regulation of taking of game and fish by Indians; (4) Refusal to apply the rule of

res adjudicata; and (5) Dismissal of cross-complaint for damages. No constitutional issues were raised at that time.

The federal questions which appellant now seeks to raise were not presented to the Supreme Court of the State of Washington. See *Beck v. Washington*, 369 U.S. 541, at 549 ff, 82 Sup. Ct. 955, 9 L.ed.2d 98 (1961). Appellee respectfully submits that federal constitutional questions may not be presented to this court unless the precise questions have been placed in issue before the state court.

CONCLUSION

Appellee respectfully submits that the appellant presents no substantial question for the decision of this court, and that the questions which appellant attempts to raise could and should have been raised in the court below. For all of the foregoing reasons appellee moves that this appeal be dismissed.

Respectfully submitted,

CHARLES O. CARROLL
King County Prosecuting Attorney
JAMES E. KENNEDY
Chief Civil Deputy
DONALD D. SKINNER
Deputy Prosecuting Attorney
EDMUND P. ALLEN
Deputy Prosecuting Attorney
J. L. CONIFF
Special Assistant Attorney General
Attorneys for Appellees



IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 246

HERMAN MOSES, ROBERT ALLEN, JR., LARRY MAURICE, LAWRENCE JERRY, DONALD JERRY, STAN MOSES, BURT MOSES, EDWIN B. DANIELS, HOWARD MOSES, BETTY GOUDY, HENRY KING GEORGE, WALTER ALLEN, ANDY DOMINICK, ARCHIE LEBEHAN, CECIL MOSES, and the MUCKLESHOOT TRIBE OF INDIANS,
Appellants,

v.

THE STATE OF WASHINGTON, THE DEPARTMENT OF FISHERIES, and THE DEPARTMENT OF GAME,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS

L. FREDERICK PAUL
Counsel for Appellants
Suite 1310-1411 Fourth Avenue Building
Seattle, Washington 98101
FREDERICK W. POST
Of Counsel
14311 Aurora Avenue North
Seattle, Washington



SUBJECT INDEX

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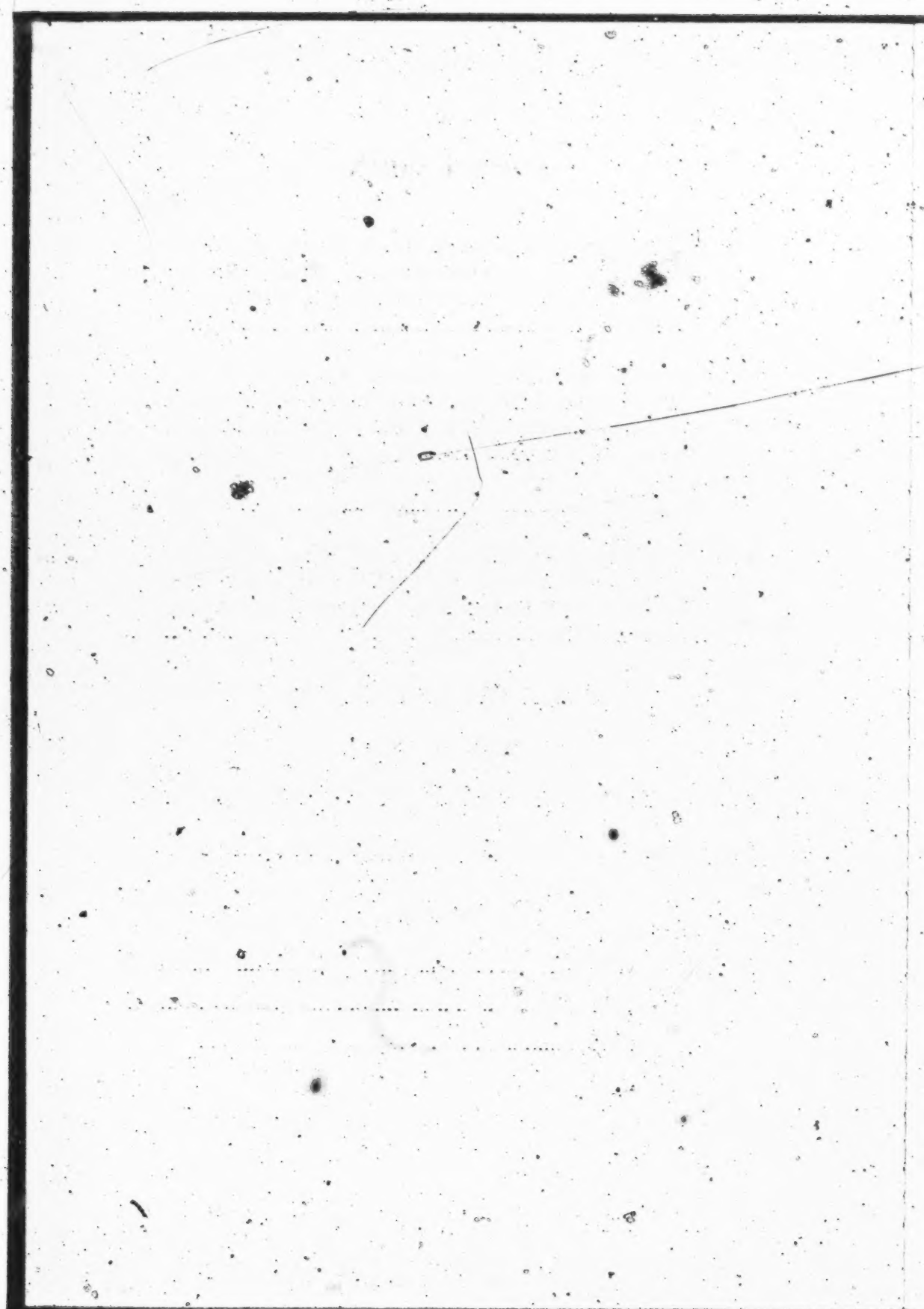
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 246

HERMAN MOSES, ROBERT ALLEN, JR., LARRY MAURICE, LAWRENCE JERRY, DONALD JERRY, STAN MOSES, BURT MOSES, EDWIN B. DANIELS, HOWARD MOSES, BETTY GOUDY, HENRY KING GEORGE, WALTER ALLEN, ANDY DOMINICK, ARCHIE LEBEHAN, CECIL MOSES, and the MUCKLESHOOT TRIBE OF INDIANS,
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THE STATE OF WASHINGTON, THE DEPARTMENT OF FISHERIES, and THE DEPARTMENT OF GAME,
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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS

I.

The Declaring of a Party to a Treaty as Not a Party Is Such a Fundamental Attack on the Treaty That It Is Equivalent to a Holding of Invalidity

Appellees' first point is that the State Supreme Court "construed" a treaty, rather than declared it invalid; *ergo*, no appellate jurisdiction lies in this court.

When a party to a treaty has been, by the state courts, read out of the treaty, it is such a fundamental attack on the treaty that it is equivalent to a holding of invalidity. Appellate jurisdiction does lie.

And, of course, if appellants be wrong, they rely on 28 U.S. Code 2103, and request the papers to be a Petition for Certiorari. No argument has been advanced by the appellees that this case is not one of public importance, and so appellants rely on their opening brief to support the same. Adopting the appellees' statement that the state court merely "construed" a treaty, even so, construing a treaty is within the certiorari jurisdiction of this court; but again, appellants assert that a destruction of a treaty as to these parties is a declaration of invalidity.

II.

Determining Who the Parties Are to a Treaty Is a Substantial Federal Question; the Construction of a Treaty Which Protects Indian Fishing Rights and the Determination of the Regulatory Authority of the Same Are Substantial Federal Questions

Appellees' second point asserts that no substantial federal question is involved.

Two broad questions are raised: A. Is the Point Elliott Treaty valid as to the Indian tribes and their members; and, B. If so, what is the extent of state regulatory powers in the regulation of treaty-protected property rights.

We cannot think of a more fundamental federal question than the determination of who are parties to a treaty. Justice Cardozo spelled out the rule in discussing district court jurisdiction in *Gully p. First National Bank*, 299 U.S. 109 (1939), at page 112, as follows:

> "How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United

> States must be an element, and an essential one, of the plaintiff's cause of action. . . . The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect and defeated if they receive another."

If the Point Elliott Treaty is construed to include the Muckleshoot tribe, then one series of rights evolve; and if contrarywise, then the Muckleshoots are without standing: *ergo*, there is appellate jurisdiction. (Interestingly enough, the justice cited *King County v. Seattle School District*, 263 U.S. 361, 363, 364.)

The second broad issue of the state's regulatory power and the extent thereof relates to 28 U.S. Code 1257 (2), which confers jurisdiction on this court by appeal where "is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, *treaties* or laws of the United States and the decision is in favor of its validity." (Emphasis supplied.)

Here the judgment reads (Tr. 3):

> "The individual defendants and all members of the Muckleshoot tribe are hereby permanently enjoined from fishing in the Green River in any manner that is contrary to the laws of the State of Washington or contrary to the rules and regulations of the Department of Fisheries of the State of Washington or the Department of Game of the State of Washington."

Thus, certain unidentified state statutes and regulations have been declared valid as opposed to treaty-protected fishing rights.

And certainly, under certiorari jurisdiction of 28 U.S. Code 1257(3), the appellants claim a "right (or) privilege" "under the Constitution, treaties or statute of . . . the United States."

III.

The Federal Questions Were Timely Raised in the Trial Court and Decided by It, and Were Timely Raised in the State Supreme Court and Decided by It

Appellees' third point relates to the lack of timeliness in raising the federal questions sought to be reviewed.

In addition to the citations on timely raising the federal questions described in Appellants' Jurisdictional Statement, there exists the following:

At the trial level, the court entered the following Conclusions of Law:

"II.

"That the Skope-ahmish band of Indians residing on the upper Green River were not signatories of the Point Elliott Treaty, and that their descendants, who are members of the present-day Muckleshoot tribe, acquired no rights by virtue of said treaty." (Tr. 12)

• • •

"IV.

"That if the Treaty of Point Elliott were to be interpreted as having been made for all Indians residing within the ceded area, which would have included the Skope-ahmish and thus, although not signers of the treaty, the aboriginal ancestors of the descendants were entitled to the benefits of the treaty, the court would have made the following conclusions; and does make them for the purpose of this case:

"V.

"That the anadromous fish conservation program of the State of Washington as it affects the Soos Creek Hatchery and the Green River are integral and necessary parts of an overall state conservation program.

"VI.

"That to permit the defendant Indians to fish as they did in September, 1963, and as they most probably would do in the future if not restrained, would seriously hamper and ultimately destroy the effectiveness of the state's conservation program, particularly as applied to the Soos Creek Hatchery and the Green River.

"VII.

"That if the treaty is considered to have been negotiated for the benefit of all persons whose lands were taken so as to vest in these defendants any rights, such rights could fully be satisfied by the Washington State Department of Fisheries delivering to that portion of the Muckleshoot Tribe who have Skope-ahmish blood, the carcasses of ten per cent of the fish removed from Soos Creek for use by the hatchery. This would be consistent with what the state maintains it has been doing, and proposes to do in the future, except possibly that the number of fish might be in excess of what might have been delivered. This would mean, if this were done—the run of Chinook Salmon exceeded twenty-five thousand at the hatchery, if I remember the figures correctly, and it would mean that they would turn over to those Indians about twenty-five hundred of each species of fish during a given year. In this manner the number taken under these circumstances would in no way affect the maintenance of the program of conservation and yet would permit these Indians to receive the amount of fish consistent with what their ancestors removed from the stream for their subsistence maintenance. Such use of the Green River and delivery of fish to the descendants of the Skope-ahmish Indians would be consistent with the law as presently existing in this state under *State v. McCoy*." (Tr. 12)

At the State Supreme Court level, appellants in their Brief of Appellants, at p. 20, stated:

"The trial court should have concluded that the

members of the Muckleshoot Tribe have the same rights under the Treaty as do members of other tribes named in the Treaty. . . .

• • •

"3. The trial court should have been guided by the United States 9th Circuit Court decision in *Maison etc. v. State of Oregon, supra.* It was bound to find as did the Honorable Frank D. James that complete exclusion of Indians from fishing upstream from the Soos Creek Hatchery was not indispensable to conservation of the fish run, and should have made a reasonable provision for Indian fishing upstream. Instead the court recommended that the State of Washington give the Indians salmon carcasses from the hatchery until they are paid for their lands by the United States Government which is a meaningless gesture on the part of the court. The appellants object to receiving carcasses as a substitute for their right to fish."

The State Supreme Court began its decision in the instant case (Jurisdictional Statement A-46) as follows:

"This is an action involving claimed off-reservation treaty fishing rights by Indian defendants; and it is a companion case to that of the Puyallup Indians (70 W.D.2d 241, P.2d -), and of the Nisqually Indians (70 W.D.2d 270, P.2d -), filed today but presenting a different facet of the problem."

Then the court considered whether or not the appellants were members of a tribe which was party to the Point Elliott Treaty and concluded that portion of its argument, both as to the signatory problem and the subjunctive problem of what the court's decision would have been had the Muckleshoot tribe been such a signatory, by concluding (Jurisdictional Statement A-50):

"Having discussed the over-riding issues. . . ."

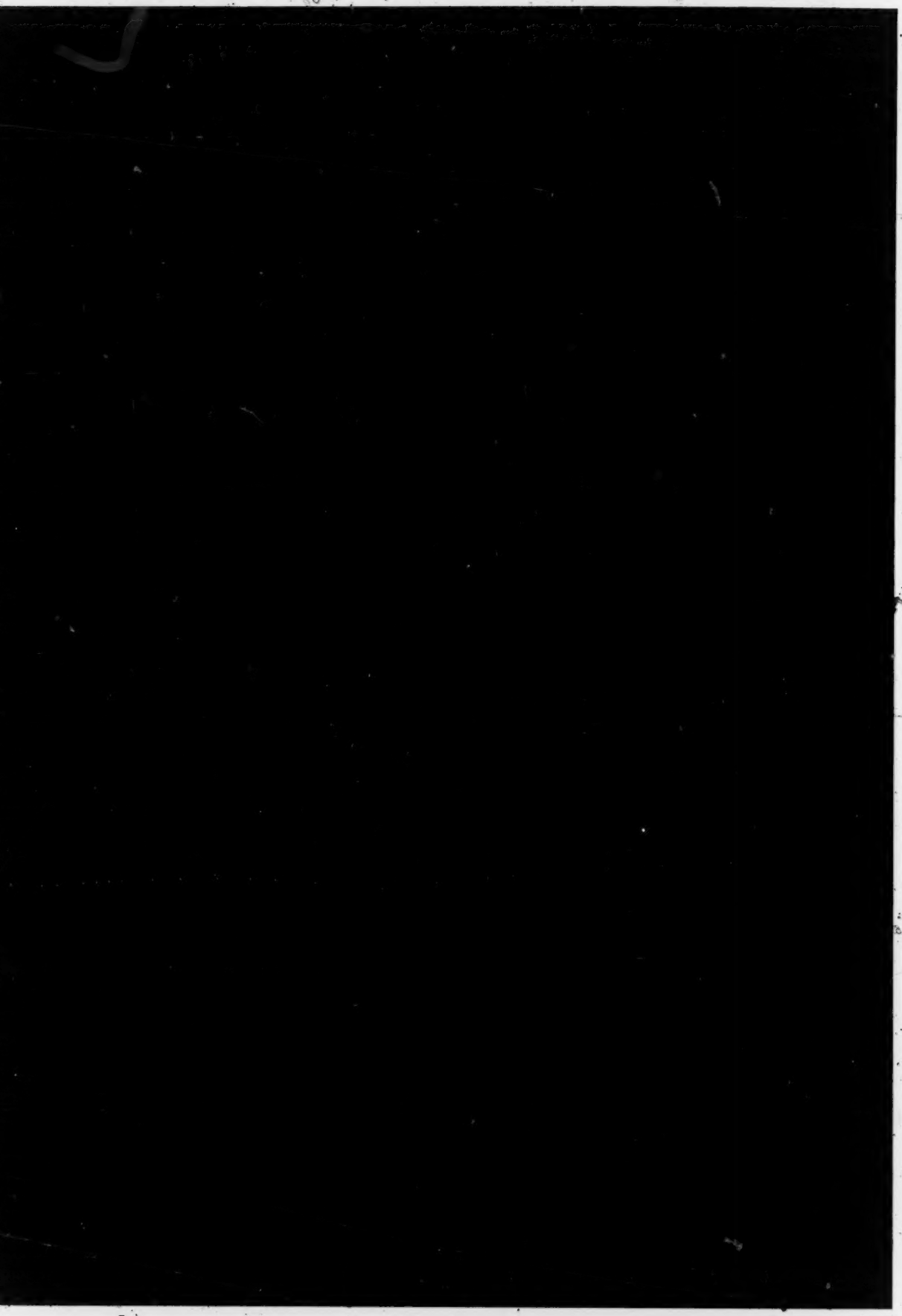
Thus, appellees third point that the issues were not timely raised or considered by the state courts is without foundation.

Wherefore, appellants pray that the Motion to Dismiss be overruled.

Respectfully submitted,

L. FREDERICK PAUL
Counsel for Appellants

FREDERICK W. POST
Of Counsel





In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 246

HERMAN MOSES, ET AL., APPELLANTS

v.

THE STATE OF WASHINGTON, ET AL.

No. 247

THE PUYALLUP TRIBE, PETITIONER

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON, ET AL.

No. 319

NUGENT KAUTZ, ET AL., PETITIONERS

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON, ET AL.

ON APPEAL FROM, AND PETITIONS FOR WRITS OF CERTIORARI TO, THE SUPREME COURT OF THE STATE OF WASHINGTON

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

By order of October 9, 1967, the Solicitor General was invited to express the views of the United

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States with respect to these cases involving the off-reservation fishing rights of certain Indian tribes in the State of Washington.

Each of the cases was initiated by the Washington Game and Fisheries Departments to enjoin Indians who claim immunity under federal treaties from conducting their fishing operations in violation of the conservaton laws of the State. In No. 246 the defendants (petitioners here) are members of the Muckleshoot Tribe asserting fishing rights under the Point Elliot Treaty of January 22, 1855 (12 Stat. 927); in No. 247 and No. 319, the defendants are Puyallup Indians and Nisqually Indians, respectively, asserting fishing rights under the Treaty of Medicine Creek, signed December 26, 1854 (10 Stat. 1132). The Supreme Court of Washington held in No. 246 that the Muckleshoot Indians had no rights under the Point Elliot Treaty[1] (J.S. A46–A53).[2] In No. 247 and No. 319, the State court recognized that the beneficiaries of the Treaty of Medicine Creek still enjoyed "a right to fish at all usual and accustomed grounds," but held the right subject to regulation under State conservation laws "reasonable and necessary for the preservation of the fishery" (J.S. A24–A25, A43–A44).

[1] The State Supreme Court held that the correctness of the trial court's factual finding on this point could not be considered on appeal because the issue had not been properly raised in the assignment of error (J.S. A48).

[2] All of our references are to the Appendix to the Jurisdictional Statement in No. 246 which reproduces the opinions of the court below in all three cases.

While the issue seems precluded in No. 246, the other two cases present a question of importance: the extent of off-reservation fishing rights which have been guaranteed to the Indians by federal treaties. The matter affects not only the Indians now before the Court, but also more than a dozen other Tribes in the Pacific Northwest, beneficiaries of several treaties with almost identical provisions.[3] Although this Court has had occasion to speak to the question, it remains largely unresolved. The problem is acute, provoking bitter disputes and conflicting judicial decisions. Currently, the Secretary of the Interior has undertaken to regulate Indian fishing in a manner which provides for cooperation with State authorities,[4] but those efforts are embarrassed by the absence of a definitive ruling on the scope of the rights secured by treaty. In the circumstances, we suggest the Court might appropriately grant certiorari.

The issue arises because many treaties with Indian tribes expressly reserved to them with respect to lands

[3] See Treaty of Point Elliot (12 Stat. 927), Art. V (Suquamish, Swinamish, Lummi and others); Treaty of Point no Point (12 Stat. 933), Art. IV (Skokomish); Treaty with the Makah (12 Stat. 939), Art. IV; Treaty of Walla-Walla (12 Stat. 945), Art. I (Umatilla); Treaty with the Yakama (12 Stat. 951), Art. III; Treaty with the Nez Perce (12 Stat. 957), Art. III; Treaty of Wasco (12 Stat. 963), Art. I (Warm Springs); Treaty with the Quinaielt (12 Stat. 971), Art. III; Treaty with the Flatheads (12 Stat. 975), Art. III.

[4] We reproduce the Secretary's present regulations in an appendix, *infra*, pp. 7–17. It will be noted that Section 256.2 contemplates detailed area regulations—which have not yet been promulgated. Of course, the regulations do not purport to diminish or enlarge the rights guaranteed by treaty. See § 256.7 (b), (c).

ceded to the United States the right "to take fish at all usual and accustomed grounds and stations * * * in common with all citizens of the Territory."[5] Some have read this language as securing to the Indians only a right of equal access to certain fisheries open to others, which subsists only so long, and so far, as ordinary citizens are permitted to fish there. That view, we believe, has been rejected by this Court. *E.g.*, *United States* v. *Winans*, 198 U.S. 371; *Seufert Bros. Co.* v. *United States*, 249 U.S. 194; *Tulee* v. *Washington*, 315 U.S. 681. But the holding that these treaty provisions do more than exempt the Indians from discriminatory State laws does not end the matter. It remains to define the extent of the right reserved.

Do the treaties secure an absolute and unqualified right to fish at specified locations which the State is forbidden to inhibit whatever the consequences, as the Idaho Supreme Court seems to have held? See *State* v. *Arthur*, 74 Idaho 251, 261 P. 2d 135. Is the right subject to restriction by the State when it is "indispensable" to do so in the interest of necessary conservation, if that end "cannot be accomplished by a restriction of the fishing of others," as the Court of Appeals for the Ninth Circuit held in *Maison* v. *Confederated Tribes of the Umatilla Indian Reservation*, 314 F. 2d 169, 173? Or does the State merely bear the burden of showing that a restriction is generally neces-

[5] This is the language of the Treaty of Medicine Creek, involved in Nos. 247 and 319. The provision of the Point Elliot Treaty invoked in No. 246 is the same, except for the immaterial omission of the adjective "all" preceding "usual and accustomed grounds." The other treaties cited in n. 8, *supra*, contain substantially identical provisions.

sary to conserve the fishery, without inquiring whether it is possible to exempt the Indians with respect to the locations where their treaty rights apply? That seems to have been the approach of the Washington Supreme Court in the cases at bar. We believe the opinions below give inadequate recognition to the federally secured fishing rights of the Indians of the Pacific Northwest. At all events, however, these and other questions press for authoritative resolution and we submit the pending cases offer an appropriate occasion to end the conflict of decisions by announcing the controlling standards.

CONCLUSION

Accordingly, we urge the Court to grant the petitions for certiorari in Nos. 247 and 319.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1967.

APPENDIX

TITLE 25—INDIANS

Chapter I—Bureau of Indian Affairs, Department of the Interior

SUBCHAPTER W—MISCELLANEOUS ACTIVITIES

PART 256—OFF-RESERVATION TREATY FISHING

On page 8969 of the FEDERAL REGISTER of July 16, 1965, there was published a notice of intent to add a new Part 255 to Chapter I, Title 25, Code of Federal Regulations, and the text of the proposed regulations. The purpose of the new part was to provide a framework within which the exercise of off-reservation fishing rights secured to certain Indian tribes under treaties with the United States might be subjected to Federal regulation and control when required for conservation of the fishery resources for the benefit of the Indians and others having interests therein.

Interested persons were given an opportunity to submit data, views, or suggestions pertaining thereto within 30 days from the date of publication of the notice in the FEDERAL REGISTER. Numerous comments were received from several State Governors, State agencies, tribes, and others. These have all been considered and it has been determined that the proposed regulations should be issued in a modified form. The principal changes, other than editorial, are as follows:

The regulations have been assigned Part 256 since Part 255 has been assigned to a different subject.

Section 256.1 has been revised to more precisely and succinctly state the purposes of the regulations. The definition section has been omitted as unnecessary in the light of other changes adopted.

The section dealing with issuance of area regulations (§ 256.2) has been revised. Such regulations may be issued by the Secretary for those areas which he believes require them to assure adequate conservation and wise utilization of the fishery resources upon request of an Indian tribe, request of a State Governor, or his own motion. The Secretary may incorporate state laws or approved tribal regulations if he finds these to be consistent with the treaty and with conservation requirements.

Provisions expressly calling for recommendations to the Secretary by the Commissioner of Indian Affairs and the Commissioner of Fish and Wildlife have been deleted because they concerned matters of internal administration not appropriate for treatment by regulations. It is contemplated that, except in emergency situations, interested parties will be afforded an opportunity to submit comments and information in connection with the rule-making process and that any hearings or actions by the Commissioner of Indian Affairs and the Commissioner of Fish and Wildlife will be as agents of the Secretary in preparing a record upon which he can act. Provision has been made for the immediate promulgation of regulations if emergency conditions require. Parties will then be afforded an opportunity to submit views in support of requests for modification of such emergency regulations.

The area regulations may include requirements for reporting catch statistics which are deemed necessary for management purposes by State agencies as well as those needed by the Secretary.

Provisions applicable to identification cards (§ 256.3) have been revised to provide that these will be identification cards rather than fishing permits. They will be issued as prima facie evidence of the holder's entitlement to exercise a treaty-secured fishing right. The Commissioner of Indian Affairs may cause a government card to be issued or he may authorize use of tribally issued cards. The latter must be countersigned by a Bureau of Indian Affairs official. Copies of card forms and lists of issuing or countersigning officers must be furnished to State agencies. The deadline for requiring an approved tribal roll is advanced to January 1, 1970.

The requirement of identification of fishing gear (§ 256.4) is not limited to gear which is not in the Indian's immediate personal possession. The presumption that unmarked gear is not being used in the exercise of a treaty right applies only in the absence of proof to the contrary.

The enforcement provision (§ 256.6) is changed to provide for enforcement by tribal courts, Courts of Indian Offenses established under Part 11 of CFR Title 25 or special Courts of Indian Fishing Offenses to be established in accordance with said Part 11.

Except for § 256.3(g) and § 256.5, Part 256 shall become effective 30 days after its publication in the FEDERAL REGISTER. Section 256.3(g) and § 256.5 shall become effective 60 days after such publication.

STEWART L. UDALL,
Secretary of the Interior.

JULY 10, 1967.

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Part 256 is adopted to read as follows:

Sec.

256.1 Purpose.
256.2 Area regulations.
256.3 Identification cards.
256.4 Identification of fishing equipment.
256.5 Use of unauthorized helpers or agents.
256.6 Enforcement and penalties.
256.7 Savings provisions.

AUTHORITY: The provisions of this Part 256 issued under 25 U.S.C. 2 and 9; 5 U.S.C. 301.

§ 256.1 Purpose.

(a) The purposes of these regulations (Part 256) are:

(1) To assist in protecting the off-reservation nonexclusive fishing rights which are secured to certain Indian tribes by their treaties with the United States;

(2) To promote the proper management, conservation and protection of fisheries resources which are subject to such treaties of the United States;

(3) To provide for determination of restrictions on the manner of exercising nonexclusive fishing privileges under rights secured to Indian tribes by such treaties of the United States necessary for conservation of the fisheries resources;

(4) To assist in the orderly administration of Indian Affairs;

(5) To encourage consultation and cooperation between the states and Indian tribes in the management and improvement of fisheries resources affected by such treaties;

(6) To assist the states in enforcing their laws and regulations for the management and conservation of fisheries resources in a manner compatible with the treaties of the United States which are applicable to such resources.

(b) The conservation regulations of this Part 256 are found to be necessary to assure that the nonexclusive rights secured to certain Indian tribes by treaties of the United States to fish at usual and accustomed places outside the boundaries of an Indian reservation shall be protected and preserved for the benefit of present and future members of such tribes in a manner consistent with the nonexclusive character of such rights. Any exercise of an Indian off-reservation treaty fishing right shall be in accordance with this Part 256 and any applicable area regulations issued hereunder.

§ 256.2 Area regulations.

(a) The Secretary of the Interior may upon request of an Indian tribe, request of a State Governor, or upon his own motion, and upon finding that Federal regulation of Indian fishing in any waters in which Indians have a treaty-secured nonexclusive fishing right is necessary to assure the conservation and wise utilization of the fishery resources for the present and future use and enjoyment of the Indians and other persons entitled thereto, promulgate regulations to govern the exercise of such treaty-secured fishing right in such waters for the purpose of preventing, in conjunction with appropriate State conservation laws and regulations governing fishing by persons not fishing under treaty rights, the deterioration of the fishery resources.

(b) In formulating such regulations the Secretary of the Interior may incorporate such State laws or regulations, or such tribal regulations as have been approved by the Commissioner of Indian Affairs, as he finds to be consistent with the Indians' rights under the Treaty and the conservation of the fishery resources.

(c) Before promulgating such regulations the Secretary of the Interior will seek the views of the affected Indian tribes, of the fish or game management agency or agencies of any affected State, and of other interested persons. Except in emergencies where the Secretary finds that the exigencies require the promulgation of regulations to be effective immediately, a notice of proposed rule making will be published in the FEDERAL REGISTER in accordance with 5 U.S.C. 553 to afford an opportunity to submit comments and information, at such times and in such manner as may be specified in the notice. In the event of the emergency promulgation of regulations, interested persons will be afforded, as soon as possible, an opportunity to request amendment or revocation thereof.

(d) Any regulations issued pursuant to this section shall contain provisions for invoking emergency closures or restrictions or the relaxation thereof at the field level when necessary or appropriate to meet conditions not foreseeable at the time the regulations were issued.

(e) Regulations issued pursuant to this § 256.2 may include such requirements for recording and reporting catch statistics as the appropriate state fish and game agencies or the Secretary of the Interior deem necessary for effective fishery management.

§ 256.3 Identification cards.

(a) The Commissioner of Indian Affairs shall arrange for the issuance of an appropriate identification card to any Indian entitled thereto as prima facie evidence that the authorized holder thereof is entitled to exercise the fishing rights secured by the treaty designated thereon. The Commissioner may cause a federal card to be issued for this purpose or may authorize the issuance of cards by

proper tribal authorities: *Provided,* That any such tribal cards shall be countersigned by an authorized officer of the Bureau of Indian Affairs certifying that the person named on the card is a member of the tribe issuing such card and that said tribe is recognized by the Bureau of Indian Affairs as having fishing rights under the treaty specified on such card. Copies of the form of any identification card authorized pursuant to this section and a list of the authorized Bureau of Indian Affairs issuing or countersigning officials shall be furnished to the fisheries management and enforcement agencies of any State in which such fishing rights may be exercised.

(b) No such card shall be issued to any Indian who is not on the official membership roll of the tribe which has been approved by the Secretary of the Interior: *Provided,* That until January 1, 1970, a temporary card may be issued to any member of a tribe not having an approved current membership roll who submits evidence of his entitlement thereto satisfactory to the issuing officer and in the case of a tribally issued card, to the countersigning officer. Any Indian claiming to have been wrongfully denied a card may appeal the decision in accordance with Part 2 of this chapter.

(c) No person shall be issued an identification card on the basis of membership in more than one tribe at any one time.

(d) Each card shall state the name, address, tribal affiliation and enrollment number (if any) of the holder, identify the treaty under which the holder is entitled to fishing rights, contain such additional personal identification data as is required on fishing licenses issued under the law of the State or States within which it is used, and be signed by the issuing officer and by the holder.

(e) No charge or fee of any kind shall be imposed by the Commissioner of Indian Affairs for the issuance of an identification card hereunder: *Provided,* That this shall not prevent any Indian tribe from imposing any fee or tax which it may otherwise be authorized to impose upon the exercise of any tribal fishing right.

(f) All cards issued by the Commissioner of Indian Affairs pursuant to this Part 256 shall be and remain the property of the United States and may be retaken by any Federal, State, or tribal enforcement officer from any unauthorized holder. Any card so retaken shall be immediately forwarded to the officer who issued it.

(g) The failure of any person who claims to be entitled to the benefits of a treaty fishing right to have such a card in his immediate personal possession while fishing or engaging in other activity in the claimed exercise of such right to display it upon request to any Federal, State, or tribal enforcement officer shall be prima facie evidence that the person is not entitled to exercise an Indian fishing right under a treaty of the United States.

(h) No person shall allow any use of his identification card by any other person.

§ 256.4 Identification of fishing equipment.

All fishing gear or other equipment used in the exercise of any off-reservation treaty fishing right shall be marked in such manner as shall be prescribed in regulations issued pursuant to § 256.2 hereof to disclose the identity of its owner or user. In the absence of proof to the contrary, any fishing gear which is not so marked or labeled shall be presumed not to be used in the exercise of an off-reservation treaty fishing right and shall be subject to control or seizure under State law.

§ 256.5 Use of unauthorized helpers or agents.

No Indian shall, while exercising off-reservations treaty-secured fishing rights, permit any person 12 years of age or older other than the authorized holder of a currently valid identification card issued pursuant to this Part 256 to fish for him, assist him in fishing, or use any gear or fishing location identified as his gear or location pursuant to this Part 256.

§ 256.6 Enforcement and penalties.

(a) Any Indian tribe with a tribal court may confer jurisdiction upon such court to punish violations by its members of this Part 256 or of the area regulations issued pursuant thereto. Jurisdiction is hereby conferred upon each Court of Indian Offenses established pursuant to Part 11 of this chapter to punish such violations by members of tribes whose reservations are under the jurisdiction of such court. Courts of Indian Fishing Offenses may be created pursuant to Part 11 of this chapter to punish such violations by members of any tribe or group of tribes for which there is otherwise no Court of Indian Offenses or tribal court with jurisdiction to enforce this Part 256. The provisions of Part 11 of this chapter shall apply to any such court with respect to the exercise of its jurisdiction to enforce this Part 256. All jurisdiction conferred by this section shall apply without regard to any territorial limitations otherwise applicable to the jurisdiction of such court.

(b) Acceptance or use of an identification card issued pursuant to this Part 256 or use of any fishing gear marked or identified pursuant thereto shall constitute an acknowledgment that the fishing done under such card or with such gear is in the claimed exercise of a tribal fishing right and is subject to the jurisdiction of the tribal court, Court of Indian Offenses,

or Court of Indian Fishing Offenses. Except as may be otherwise provided by tribal regulations approved by or on behalf of the Secretary of the Interior, any person claiming to be exercising such tribal right and fishing in violation of the regulations contained in or issued under this Part 256 may be punished by a fine of not to exceed $500, imprisonment of not to exceed 6 months, or both, and shall have his tribal fishing privileges suspended for not less than 5 days for any violation of this Part 256 or of any area regulation issued pursuant thereto. The court shall impound the fishing rights identification card of any person for the period which the fishing privileges are suspended.

§ 256.7 Savings provisions.

Nothing in this Part 256 shall be deemed to:

(a) Prohibit or restrict any persons from engaging in any fishing activity in any manner which is permitted under state law;

(b) Deprive any Indian tribe, band, or group of any right which may be secured it by any treaty or other law of the United States;

(c) Permit any Indian to exercise any tribal fishing right in any manner prohibited by any ordinance or regulation of his tribe;

(d) Enlarge the right, privilege, or immunity of any person to engage in any fishing activity beyond that granted or reserved by treaty with the United States;

(e) Exempt any person or any fishing gear, equipment, boat, vehicle, fish or fish products, or other property from the requirements of any law or regulation pertaining to safety, obstruction of navigable waters, national defense, security of public property, pollution, health and sanitation, or registration of boats or vehicles;

(f) Abrogate or modify the effect of any agreement affecting fishing practices entered into between any Indian tribe and the United States or any State or agency of either.

[F.R. Doc. 67-8158; Filed, July 14, 1967; 8:45 a.m.]

U.S. GOVERNMENT PRINTING OFFICE: 1967



In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 246

HERMAN MOSES, ET AL., APPELLANTS

v.

THE STATE OF WASHINGTON, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

In the memorandum on behalf of the United States filed at the Court's invitation in this case and Nos. 247 and 319, we expressed the view that the issue as to "the extent of off-reservation fishing rights which have been guaranteed to the Indians by federal treaties" "seems precluded in No. 246" (Mem. 3). We reached that conclusion because the State Supreme Court held that appellants' failure to make timely assignments of error barred them, under local procedural rules, from challenging the trial court's findings of fact (J.S. A48), and because one of these factual findings was that appellants' ancestors were not signatories to the Treaty of Point Elliot under

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which they claim (J.S. A49–A50). Accepting that finding as final for the purposes of this case, it seemed to follow that they were foreclosed from asserting treaty fishing rights, as the court below held (J.S. A50).

In a reply to our memorandum, appellants now assert that even accepting all the trail court's findings of fact, they may yet be beneficiaries of the Treaty of Point Elliot. That result is premised on the conceded fact that, although non-signatories, their ancestors were named as contracting parties in the preamble to the treaty and were subsequently dealt with as parties to the treaty. Although the court below did not advert to it, we suppose this contention—essentially raising a question of law—would not have been viewed as procedurally foreclosed there, and, accordingly, remains open here. Certainly, the point is not frivolous. Indeed, it is the view of the Department of the Interior that the Smalh-kamish, Skope-ahmish and St-kah-mish Tribes, named in the preamble, were beneficiaries of the Treaty of Point Elliot, although their representatives were not among the signatories, and that at least some members of the Muckleshoot Tribe (including the individual appellants) presently hold rights under the treaty as descendants of those Indians. Whether this question, as it affects the fishing rights of the descendants of these particular tribes, merits review in this Court is, of course, a discrete

matter. But, at all events, we deem it appropriate to correct the implication conveyed in our earlier memorandum that the issue is foreclosed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1968





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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 246

HERMAN MOSES, ROBERT ALLEN, JR., LARRY MAURICE, LAWRENCE JERRY, DONALD JERRY, STAN MOSES, BURT MOSES, EDWIN B. DANIELS, HOWARD MOSES, BETTY GOUDY, HENRY KING GEORGE, WALTER ALLEN, ANDY DOMINICK, ARCHIE LEBEHAN, CECIL MOSES, and the MUCKLESHOOT TRIBE OF INDIANS,
Appellants,

v.

THE STATE OF WASHINGTON, THE DEPARTMENT OF FISHERIES, and THE DEPARTMENT OF GAME,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

REPLY TO BRIEF OF *AMICUS CURIAE*

By the letter of November 10, 1967, of the Clerk of this Court, appellants were authorized to file a memorandum in response to the views of the United States as expressed by her Solicitor General.

The attack on these appellants which worried the Solicitor General is expressed in his footnote 1, page 2, as follows:

"The State Supreme Court held that the correctness of the trial court's factual finding on this point

(that the tribe had no rights under the treaty because no one signed for them) could not be considered on appeal because the issue had not been properly raised in the assignment of error (J.S. A48)."

The Solicitor General misapprehends appellants' position. This is not a case seeking a review of a factual question, for example, *McCaughn v. Real Estate Etc. Co.*, 297 U.S. 606 (1936). Rather, this is where the appellants are content with the Findings and object to the Conclusions of Law. Thus, this falls within the rules set forth in 5 Am. Jur.2d, Appeal and Error, §841, page 286, as follows:

"... (an appellate court) will set aside a judgment where the facts as determined by him fail to support his legal conclusions drawn from them."

Accord, *Plombe Tool Co. v. Sanger*, 9th Cir., 1952, 193 F.2d 260, 264, and Dictum in *Fleischmann Co. v. United States*, 270 U.S. 347, 356 (1926).

When we consider *all* of the factual findings, we are content because flowing from such *all* factual findings is the conclusion of law that these appellants are parties to the Point Elliott Treaty (12 Stat. 927, J.S. A46-A53). Thus, assigning error to a particular finding as such is unnecessary.

In its Findings of Fact and Conclusions of Law, the trial court held that there was and is a Skope-ahmish Tribe;[1] that the individual appellants are members there-

1. In Conclusion of Law 1, there is a finding of fact as follows:
"... the Court considers, for purposes of this case, those descendants of the aboriginal band who now reside on the Muckleshoot Reservation and who have, for the past year and a half, acted in concert, sufficiently constitutes a tribe for purposes of this case." (St. 232; Tr. 11-12)

of;[2] that their ancestors inhabited the upper reaches of the Green River;[3] that their ancestors, when fishing, employed on the Green River weirs, traps, nets, spears, and gaffs;[4] that by reason of the Point Elliott Treaty the United States took over their lands.[5]

Our point here is that when an Indian tribe is named in the Treaty and, as a part thereof, the tribe ceded its property to the United States, whether the Indian tribe signed the Treaty is immaterial. If the United States accepted the cession of lands from the Indians, it thereby assumed the burdens of the Treaty.

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2. Finding of Fact XXI as follows:

"The individual defendants and other members of the present day Muckleshoot Tribe who claim to have Skope-ahmish blood are most probably descendants of these aboriginal Indians whose lands were taken over by the United States Government following the Treaty of Point Elliott." (St. 230; Tr. 9-10)

3. Finding of Fact XVIH as follows:

"In aboriginal times a band or tribe of Indians known as the Skope-ahmish lived on the upper Green River, which they used to maintain a subsistence existence. They were about fifty in number." (St. 229; Tr. 9)

4. Finding of Fact XXIII as follows:

"The aboriginal band of Skope-ahmish Indians in fishing the Green River employed weirs, traps, nets, spears, and gaffs, . . ." (St. 230; Tr. 10)

5. Finding of Fact XX as follows:

"Following the signing of the Point Elliott Treaty, the lands where the Skope-ahmish Indians resided on the Green River were taken over by the United States, and after the establishment of the Muckleshoot Reservation in 1857, these Indians assumed residence on that reservation." (St. 229; Tr. 10)

and Finding of Fact XXI as follows:

"The individual defendants and other members of the present day Muckleshoot Tribe who claim to have Skope-ahmish blood are most probably descendants of these aboriginal Indians whose lands were taken over by the United States Government following the Treaty of Point Elliott." (St. 230; Tr. 9-10)

and in Conclusion of Law 3, there is a finding of fact as follows:

"That while the Skope-ahmish Indians were unjustly dealt with by the United States in that their land was taken without compensation following the Point Elliott Treaty, . . ." (St. 232; Tr. 12)

Secondly, it is a novelty in the law that one need sign a contract before it becomes one, e.g. unilateral contracts. Restatement of Contracts §21. For the establishment of a contract, so far as one who has performed his promise, it simply does not matter whether he signed the contract. Rather, the other *must* perform likewise. The Indians ceded their lands; *ergo*, the United States must recognize the fishing rights reserved therein, whether the tribe signed or not. Thus, the failure to object to the finding of no signatory is not fatal because the findings by the trial court that the Skope-ahmish tribe is a tribe and that the individual defendants are members thereof and that the tribe lived and fished on the Green River and then ceded these lands to the United States make the finding of no signatory irrelevant; and from these findings, a court must form a Conclusion of Law that the tribe is a *party* to the Treaty.

But more importantly, both the trial court and the State Supreme Court discussed the preamble to the Treaty, and so let us take a look at it (J.S. A-1). We suggest that as a matter of law the factual finding of no signatory on behalf of these tribes must yield to the words of the Treaty itself.

There are two important paragraphs. The first one reads in bare outline as follows, with emphasis added:

> "Whereas a treaty was made . . . by Isaac I. Stevens . . . and the hereinafter-named chiefs, headmen and delegates of the . . . Smalh-kahmish, Skope-ahmish, St-kah-mish . . . *on behalf of said tribes and duly authorized by law;*"

From the foregoing words of authority, one could easily

argue that the agency problem is foreclosed. But our answer to this question is tied down even better in the next paragraph:

> "Articles of agreement . . . by Isaac I. Stevens . . . and the undersigned chiefs, headmen, and delegates of the . . . Smalh-kamish, Skope-ahmish, Stkah-mish . . . *on behalf of said tribes, and duly authorized by them.*"

Thus, from the findings and from the words of the Treaty, one must conclude as a matter of law that these appellants are parties to the Treaty.

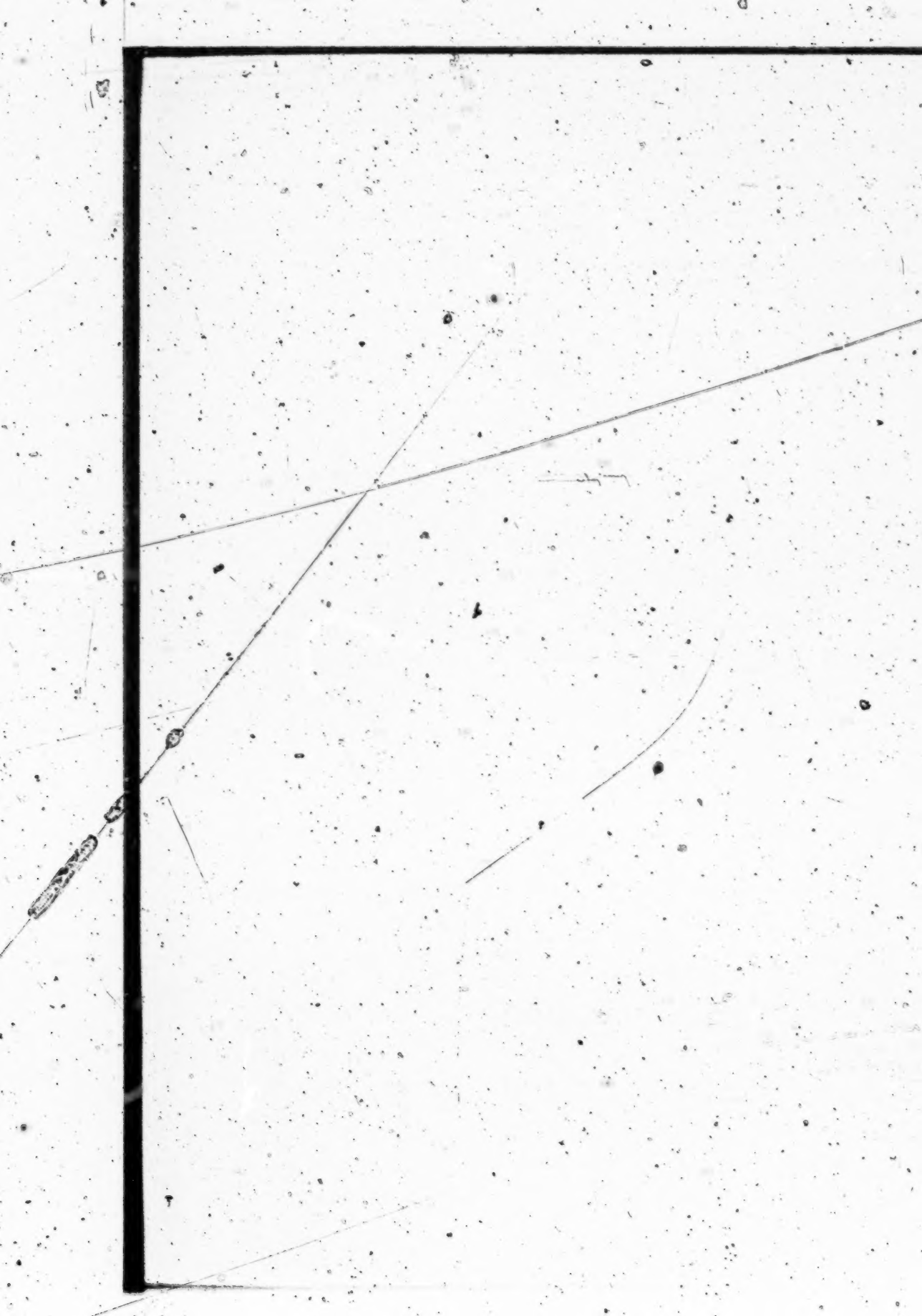
It seems a little strange for the Court of Claims to hold that these Indians "were parties to the Treaty of 1855(.)" *Duwamish et al. Indians v. United States,* 79 Ct. Cl. 530, 604, on the one hand, and the irrelevant finding of no signatory to be controlling on the other hand, Cf. 79 Ct. Cl. 530, 556 and 603.

Appellants submit the foregoing contains substantial arguments superficially considered by the trial court and the State Supreme Court (the timeliness of raising these arguments has been developed in J.S. 7-8 and Appellant's Brief Opposing Motion to Dismiss, p. 4) and, when considered in the context of the lower court's invalidating a solemn treaty of the United States after reaping the benefits therefrom and thereby disavowing the promises to such parties, that probable jurisdiction should be noted for a plenary hearing.

Respectfully submitted,

FREDERICK PAUL
Counsel for Appellants

FREDERICK POST
Of Counsel



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 246

HERMAN MOSES, ROBERT ALLEN, JR., LARRY MAURICE, LAWRENCE JERRY, DONALD JERRY, STAN MOSES, BURT MOSES, EDWIN B. DANIELS, HOWARD MOSES, BETTY GOUDY, HENRY KING GEORGE, WALTER ALLEN, ANDY DOMINICK, ARCHIE LEBEHAN, CECIL MOSES, and the MUCKLESHOOT TRIBE OF INDIANS,
Appellants,

v.

THE STATE OF WASHINGTON, THE DEPARTMENT OF FISHERIES, and THE DEPARTMENT OF GAME,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR REHEARING

COME Now the above-named appellants and petition for the rehearing of their appeal in the above-entitled case.

The Court may have indulged in the same error that the Solicitor General allowed himself to commit. He first said that the appellants were "precluded" from fighting the fishing wars because they had failed to assign error to the trial court's finding that no one had signed for the tribe in the Treaty of Point Elliott.

However, following appellants' printed reply and private communication to him, the Solicitor General reversed his position by stating in an additional memorandum:

> ". . . That result is premised on the conceded fact that, although non-signatories, their ancestors were named as contracting parties in the preamble to the treaty and were subsequently dealt with as parties to the treaty. Although the court below did not advert to it, we suppose this contention—essentially raising a question of law—would not have been viewed as procedurally foreclosed there, and, accordingly, remains open here. *Certainly, the point is not frivolous.* Indeed, it is the view of the Department of the Interior that the Smalh-kamish, Skope-ahmish and St-kah-mish Tribes, named in the preamble, were beneficiaries of the Treaty of Point Elliott . . ." (Emphasis supplied)

Perhaps what compelled the Solicitor General to revise his view was the trial court's finding that the appellants ceded their land to the United States *by reason of the Point Elliott Treaty* and thus were *beneficiaries* of the Treaty, irrespective of the signatories. This has been appellants' contention continually—that there is no reason to object to the finding that they were not signatories because the trial court found that they, as aforesaid, were beneficiaries.

As the Solicitor General stated, this point is "not frivolous" nor is it "procedurally foreclosed." Thus, as beneficiaries, the Solicitor General did and the Court should follow the rationale of *Northern Pacific Railway Company v. United States*, 227 U.S. 355, 356-367 (1913).

In the *Northern Pacific* case, the dispute was over an interpretation of the Yakima Treaty relating to the area of the reserved lands and an ambiguity in the words of

reservation. In a sense, it was urged that because the Land Department had for some decades held a view restricting the size of the reservation and thereby enlarging the public domain, a *fait accompli* had been effected; but the Court rejected such an argument stating:

> If the government may control the cession and control the survey and by the action of its agents foreclose inquiry or determine it, an easy means of rapacity is afforded much quieter but as effectual as fraud. We should hesitate to put the government in that attitude. It rejects that attitude and *accepts a greater responsibility*. 227 U.S. 355, 366 (Emphasis added)

Thus, if, *as the trial court found as a fact*, the Muckleshoots ceded their lands by reason of the Point Elliott Treaty, but then the burden imposed on the United States, the reserved fishing rights of the Indians, is disavowed, the United States will have defrauded the Indians.

The Solicitor General is unwilling to put the United States in such a position and is now urging that the Indians have substantial arguments to support their contention that they are beneficiaries of the Treaty without being signatories and even adds that the Department of the Interior regards appellants as beneficiaries. He has rejected, as the court in *Northern Pacific* did, the argument that the United States may accept the cession and then disavow the burden of reserved rights. He has accepted the greater responsibility and refuses to weasel out of a promise made and accepted over one-hundred years ago. We respect his intellectual integrity.

Now, it is up to the Court to inquire whether the State

of Washington, as successor of the United States, can accept the lands granted by the Muckleshoots and dismiss the burdens promised as consideration for the same. The finding that they were not signatories must be accepted by the appellants as true. The finding that they ceded their lands and thus became beneficiaries likewise must be accepted by all parties as true. How, then, can the United States accept the cession of land from beneficiaries of a treaty and refuse to grant said benefits to those who must be acknowledged as beneficiaries without perpetrating a fraud; assuming such, the answer to the paradox is to allow the Muckleshoots to fight their fishing wars against the State of Washington just as the Puyallups and Nisquallys are now permitted to do.

WHEREFORE, appellants pray for rehearing in the above-entitled matter, for a note of probable jurisdiction, and setting the case down for a plenary hearing.

Respectfully submitted,

L. FREDERICK PAUL
Counsel for Appellants

FREDERICK POST
Of Counsel

CERTIFICATE OF MERIT

The undersigned, as counsel for said appellants, does hereby certify that the within petition for rehearing is presented in good faith and not for delay.

L. FREDERICK PAUL

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

MOSES ET AL. *v.* WASHINGTON ET AL.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 246. Decided December 18, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.